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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

I-ENTERPRISE COMPANY LLC,

No. C-03-1561 MMC

Plaintiff,

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTIONS FOR SUMMARY JUDGMENT;
VACATING HEARING**

v.

(Docket Nos. 471, 472, 473)

DRAPER FISHER JURVETSON
MANAGEMENT COMPANY V, LLC, et al.,

Defendants

/

Before the Court are three separate motions for summary judgment, filed October 14, 2005 by, respectively: (1) defendants Timothy C. Draper ("Draper"), John H.N. Fisher ("Fisher"), and Stephen T. Jurvetson ("Jurvetson") (collectively, "individual defendants"); (2) defendant Draper Fisher Jurvetson Management Company V, LLC ("DFJ-V"); and (3) defendant Draper Fisher Jurvetson Management Company VI, LLC ("DFJ-VI"). Plaintiff I-Enterprise Company LLC ("I-Enterprise") has filed a consolidated opposition to the three motions. The individual defendants, DFJ-V, and DFJ-VI have separately filed replies.¹ Having considered the papers submitted in support of and in opposition to the motions, the

¹ The repeated cross-referencing used in defendants' motions and replies needlessly complicated the Court's review of the motions. In light of the considerable overlap among the motions, it would have been preferable had defendants sought leave to file a single motion in excess of the page limit provided in the Civil Local Rules.

1 Court finds the motions appropriate for decision without oral argument, see Civil L.R.
 2 7-1(b), and hereby VACATES the November 18, 2005 hearing. For the reasons set forth
 3 below, the motions are GRANTED in part and DENIED in part.

4 **BACKGROUND**

5 In 1998 and 1999, I-Enterprise, through its predecessors-in-interest, invested in two
 6 venture capital funds, Draper Fisher Jurvetson Fund V L.P. ("Fund V") and Draper Fisher
 7 Jurvetson Fund VI L.P. ("Fund VI") (collectively, "the Funds"). (See Fourth Amended
 8 Complaint ("4AC") ¶¶ 1, 4.) I-Enterprise alleges it has suffered more than \$40 million in
 9 damages as a result of defendants' fraudulent and negligent misrepresentations, breach of
 10 contract, breach of fiduciary duty, state securities law violations, conversion, and unjust
 11 enrichment. (See *id.* ¶¶ 1, 3.)

12 Defendant DFJ-V is the general partner of Fund V. (See *id.* ¶ 5.) Defendant DFJ-VI
 13 is the general partner of Fund VI. (See *id.* ¶ 6.) The individual defendants are managing
 14 directors of DFJ-V and DFJ-VI. (See *id.* ¶¶ 7-9.) The individual defendants are also
 15 general partners in the Draper Fisher Jurvetson general partnership ("DFJ"). (See *id.*)

16 **LEGAL STANDARD**

17 Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment as
 18 to "all or any part" of a claim "shall be rendered forthwith if the pleadings, depositions,
 19 answers to interrogatories, and admissions on file, together with the affidavits, if any, show
 20 that there is no genuine issue as to any material fact and that the moving party is entitled to
 21 judgment as a matter of law." See Fed. R. Civ. P. 56(b), (c). Material facts are those that
 22 may affect the outcome of the case. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
 23 248 (1986). A dispute as to a material fact is "genuine" if there is sufficient evidence for a
 24 reasonable jury to return a verdict for the nonmoving party. See *id.* The Court may not
 25 weigh the evidence. See *id.* at 255. Rather, the nonmoving party's evidence must be
 26 believed and "all justifiable inferences must be drawn in [the nonmovant's] favor." See
 27 *United Steelworkers of Am. v. Phelps Dodge Corp.*, 865 F.2d 1539, 1542 (9th Cir. 1989)
 28 (en banc) (citing *Liberty Lobby*, 477 U.S. at 255).

1 The moving party bears the initial responsibility of informing the district court of the
 2 basis for its motion and identifying those portions of the pleadings, depositions,
 3 interrogatory answers, admissions and affidavits, if any, that it contends demonstrate the
 4 absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317,
 5 323 (1986). Where the nonmoving party will bear the burden of proof at trial, the moving
 6 party's burden is discharged when it shows the court there is an absence of evidence to
 7 support the nonmoving party's case. See id. at 325.

8 Where the moving party "bears the burden of proof at trial, he must come forward
 9 with evidence which would entitle him to a directed verdict if the evidence went
 10 uncontested at trial." See Houghton v. South, 965 F.2d 1532, 1536 (9th Cir. 1992)
 11 (citations omitted); see also Fontenot v. Upjohn, 780 F.2d 1190, 1194 (5th Cir. 1986)
 12 (holding when plaintiff moves for summary judgment on an issue upon which he bears the
 13 burden of proof, "he must establish beyond peradventure all of the essential elements of
 14 the claim . . . to warrant judgment in his favor.") (emphasis in original).

15 A party opposing a properly supported motion for summary judgment "may not rest
 16 upon the mere allegations or denials of [that] party's pleading, but . . . must set forth
 17 specific facts showing that there is a genuine issue for trial." See Fed. R. Civ. P. 56(e); see
 18 also Liberty Lobby, 477 U.S. at 250. The opposing party need not show the issue will be
 19 resolved conclusively in its favor. See Liberty Lobby, 477 U.S. at 248-49. All that is
 20 necessary is submission of sufficient evidence to create a material factual dispute, thereby
 21 requiring a jury or judge to resolve the parties' differing versions at trial. See id.

22 The district court is not required to search the record sua sponte for some genuine
 23 issue of material fact. See Keenan v. Allan, 91 F.3d 1275, 1279 (9th Cir. 1996) ("It is not
 24 our task, or that of the district court to scour the record in search of a genuine issue of
 25 triable fact. We rely on the nonmoving party to identify with reasonable particularity the
 26 evidence that precludes summary judgment."); see also Carmen v. San Francisco Unified
 27 School District, 237 F.3d 1026, 1031 (9th Cir. 2001) ("The district court need not examine
 28 the entire file for evidence establishing a genuine issue of fact, where the evidence is not

1 set forth in the opposing papers with adequate references so that it could conveniently be
2 found.”)

3 **DISCUSSION**

4 **A. Failure to Answer Third Amended Complaint**

5 As an initial matter, the Court addresses I-Enterprise’s argument that defendants’
6 failure to “answer the allegations added by the Third Amended Complaint,” (see Opp. at 30
7 n.10), requires the Court to find defendants have admitted those allegations.

8 The Third Amended Complaint was filed April 4, 2005. On April 25, 2005,
9 defendants filed a motion to dismiss certain causes of action alleged in the Third Amended
10 Complaint. Pursuant to Rule 12(a)(4)(A) of the Federal Rules of Civil Procedure, when a
11 motion to dismiss has been filed, the defendant is not required to answer the complaint until
12 ten days after the Court rules on the motion. See Fed. R. Civ. P. 12(a)(4)(A). On July 15,
13 2005, the Court granted the motion in part and denied it in part, and did not grant leave to
14 amend any of the dismissed claims. Accordingly, defendants were required to answer the
15 complaint by July 29, 2005. See id.; see also Fed. R. Civ. P. 6 (providing where “period of
16 time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and
17 legal holidays shall be excluded in the computation”). Defendants did not do so.

18 On August 19, 2005, I-Enterprise filed a motion for leave to file a Fourth Amended
19 Complaint, which motion the Court granted on September 12, 2005. I-Enterprise filed its
20 Fourth Amended Complaint on September 13, 2005. On September 26, 2005, defendants
21 filed a new motion to dismiss, which the Court granted in part and denied in part on
22 November 3, 2005. Thereafter, on November 18, 2005, defendants timely answered the
23 Fourth Amended Complaint.

24 Although I-Enterprise is correct that statements in a complaint are deemed admitted
25 when not denied in the answer, see Fed. R. Civ. P. 8(d), none of the cases on which
26 I-Enterprise relies involve the instant situation, where a defendant fails to answer a
27 complaint but files a timely answer to an amended complaint. The Ninth Circuit has held
28 that an “amended complaint supersedes the original, the latter being treated thereafter as

1 non-existent." See Loux v. Rhay, 375 F.2d 55, 57 (9th Cir. 1967). As the Third Amended
 2 Complaint has been superseded by the Fourth Amended Complaint, and, consequently, is
 3 deemed to be non-existent, and defendants have timely answered the allegations of the
 4 Fourth Amended Complaint, the Court finds defendants' failure to answer the Third
 5 Amended Complaint does not constitute an admission of any of the allegations of the Third
 6 Amended Complaint.

7 **B. Negligent Misrepresentation Claims**

8 Defendants move for summary judgment on I-Enterprise's claims for negligent
 9 misrepresentation. The elements of negligent misrepresentation are: (1) a representation
 10 as to a past or existing material fact; (2) the representation was untrue; (3) the defendant
 11 made the representation without any reasonable ground for believing it to be true; (4) the
 12 representation was made with the intent to induce plaintiff to rely upon it; (5) the plaintiff
 13 was unaware of the falsity of the representation, acted in reliance upon the truth of the
 14 representation, and was justified in relying upon the representation; and (6) damages. See
 15 BAJI 12.45; see also Hydro-Mill Co., Inc. v. Hayward, Tilton and Rolapp Ins. Assoc., 115
 16 Cal. App. 4th 1145, 1154 (2004) (noting elements of negligent misrepresentation are
 17 "[m]isrepresentation of a past or existing material fact, without reasonable ground for
 18 believing it to be true, and with intent to induce another's reliance on the fact
 19 misrepresented; ignorance of the truth and justifiable reliance on the misrepresentation by
 20 the party to whom it was directed; and resulting damage").

21 "To state a cause of action for negligent misrepresentation, plaintiff must allege facts
 22 establishing that the defendant owed him a duty to communicate accurate information."
 23 See Friedman v. Merck & Co., 107 Cal. App. 4th 454, 477 (2003). I-Enterprise's claims for
 24 negligent misrepresentation are based on alleged misrepresentations and omissions in the
 25 Offering Memoranda and the Limited Partnership Agreements ("LPAs"), in connection with
 26 the marketing of Funds V and VI. (See 4AC ¶¶ 173, 230.) "California courts have
 27 recognized a cause of action for negligent misrepresentation, i.e., a duty to communicate
 28 accurate information . . . where information is conveyed in a commercial setting for a

1 business purpose.” See id. In addition, “a seller of a limited partnership interest owes a
 2 fiduciary duty [to disclose all material facts] to the prospective purchaser of such an
 3 interest.” See Eisenbaum v. Western Energy Resources, Inc., 218 Cal. App. 3d 314, 322,
 4 324 (1990). Further, where “one is under no duty to speak, but yet undertakes to do so,
 5 either voluntarily or in response to inquiry, he must make a full and fair disclosure and
 6 conceal no facts within his knowledge which materially qualify those stated[.]” See Kuhn v.
 7 Gottfried, 103 Cal. App. 2d 80, 86 (1951). Finally, general partners have a fiduciary duty
 8 “to make a full and fair disclosure of all matters substantially affecting the value of the
 9 partnership.” See, e.g., McCain v. Phoenix Resources, Inc., 185 Cal. App. 3d 575, 579
 10 (1986). Accordingly, under the circumstances presented in the instant case, I-Enterprise
 11 has shown that defendants had a duty to communicate accurate information.

12 **1. Alleged Misrepresentations**

13 Defendants’ first ground for dismissal is that I-Enterprise has no evidence that
 14 defendants made any misrepresentations. In response, I-Enterprise submits evidence of
 15 the following asserted misrepresentations.

16 **a. DFJ’s investment objectives and place in the venture
 17 capital market**

18 I-Enterprise contends that defendants made the following misrepresentations in the
 19 Offering Memoranda for Funds V and VI with respect to DFJ’s investment objectives and
 20 position in the venture capital market:

- 21 – DFJ’s “franchise’ has become synonymous with seed stage and start-up
 22 investing.” (See Greenstein Decl. Ex. 2 (Fund V Offering Memorandum (“Fund V
 23 OM”), dated June 1998, at 6; Ex. 80 (Fund VI Offering Memorandum (“Fund VI
 24 OM”), dated June 1999, at 7.)
- 25 – “[W]e will maintain our proven investment strategy, primarily consisting of:
 26 [¶] a resolve to assume higher risk than other firms – by investing at an earlier
 27 stage – in order to obtain higher rewards; . . . [¶] a willingness to invest
 28 relatively small amounts into deals (true ‘seed’ deals); . . . [¶] [and] a resolve
 to add value by working hard for our portfolio companies to position them for
 larger follow-on rounds of financing.” (See Fund V OM at 7; Fund VI OM
 at 8.)
- “Our niche – designated as the ‘seed,’ or ‘start-up,’ or ‘early’ stage, and defined as
 a willingness to assume substantial risk by investing in unproven teams, markets
 and technologies – is occupied by very few firms anywhere in the nation. Such

1 positioning enables us to be the first professional investor in over 80% of our
 2 portfolio companies, a status that confers on us excellent pricing leverage on our
 3 deals. Since few entrepreneurs are able to obtain professional funding, we have
 4 strong pricing leverage when we make initial investments in start-up companies.
 5 When, after building the management team, completing product development,
 6 refining strategies and tactics, and generally reducing investment risk, the time
 7 comes to obtain larger rounds of follow-on funding, we find that there is often strong
 8 interest among the many mainstream venture capital firms to invest in our deals.”
 9 (See Fund V OM at 7; Fund VI OM at 8.)

10 – “The most compelling reasons for an investment in [Fund V and Fund VI]
 11 include . . . [¶] The niche we occupy – relatively small, early stage deals – is still
 12 relatively underserved.” (See Fund V OM at 11-12; Fund VI OM at 13.)

13 – There is a “void in the industry with few established firms and few
 14 experienced venture capitalists focusing on early stage investment
 15 opportunities. It is precisely this gap which Draper Fisher Jurvetson fills.”
 16 (See Fund V OM at 13; Fund VI OM at 14.)

17 – “There exist a handful of early stage venture funds, but we rarely encounter
 18 them in head-to-head competition.” (See Fund V OM at 19; Fund VI OM at
 19 19.)

20 I-Enterprise argues that these statements, for several reasons, were untrue at the time they
 21 were made.

22 First, I-Enterprise argues the above-quoted statements were untrue because at the
 23 time they were made, the venture capital industry was in a period of unprecedented growth
 24 and change, and seed stage investing was no longer a “niche,” nor was it “underserved.”
 25 I-Enterprise submits no evidence, however, in support of this contention. Rather,
 26 I-Enterprise relies on general testimony from Fisher’s deposition that “industry dynamics
 27 changed dramatically from 1996 to 1999, like it was practically a different world.” (See Kent
 28 Decl. Ex. 2 (Fisher Dep.) 435:25-436:2.)

29 Second, I-Enterprise argues, DFJ’s statements that it was a “seed stage” or “early
 30 stage” venture capital firm were no longer true at the time the Fund V and VI Offering
 31 Memoranda were distributed.² With respect to the Fund V OM, however, I-Enterprise
 32 submits no evidence that such statements in the Fund V OM were false at the time they
 33 were made. Rather, I-Enterprise relies on evidence of investments made by Fund V as

28 ² As noted above, the Fund V OM is dated June 1998 and the Fund VI OM is dated
 29 July 1999. (See Fund V OM at 1; Fund VI OM at 1.)

1 proof that such statements in the Fund VI OM were false at the time they were made. In
2 particular, I-Enterprise submits evidence that, by July 1999, eight of Fund V's eighteen
3 investments had been made in Series B or higher rounds³, including multi-million-dollar
4 Series C investments in Net Zero, Wit Capital, Digital Work, and RealNames. (See
5 Rosenbaum Decl. ¶ 17.) Rosenbaum attests that "66% of the monies invested by Fund V
6 were invested in Series B or higher financings," and that "DFJ was the first professional
7 investor in fewer than half of Fund V's investments as of July 31, 1999, and in only one-
8 third of the investments with which DFJ rounded out the Fund by September 30, 1999."
9 (See *id.* ¶¶ 18-20.) In addition, although the Fund V OM stated that DFJ "typically invests
10 between \$500k and \$2.5 million in seed/start-up rounds," (see Fund V OM at 23),
11 Rosenbaum attests that by July 1999, Fund V "had written 8 initial investment checks
12 greater than \$2.5 million, with 2 of these checks exceeding \$5,000,000." (See Rosenbaum
13 Decl. ¶ 23.)

14 With respect to Fund VI, Rosenbaum attests, 44% of that fund's "initial investments"
15 were made in "10 later stage companies." (See id. ¶ 22.) In addition, although the Fund VI
16 OM stated that DFJ "typically invests between \$1 million and \$5 million in seed/start-up
17 rounds," (see Fund VI OM at 23), Rosenbaum attests that "Fund VI made 9 initial

³ According to Paul Rosenbaum (“Rosenbaum”), an expert witness for I-Enterprise, “Series A and initial Common designations indicate seed and very early stage, while series B and higher indicate later stage financings.” (See Rosenbaum Decl. ¶ 15.) Draper testified at deposition, however, that terms such as “early stage,” “later stage,” and “seed stage” “don’t have a concrete definition.” (See Kent Decl. Ex. 1 at 377:6-17.) Draper also disagreed with the statement that “later-stage opportunities are Series B and onwards,” and testified that “‘later stage,’ ‘Series B,’ . . . all have a variety of different understanding[s], so people have different understandings of what all these things mean.” (See id. at 376:17-25.) An email from Draper, dated January 14, 2001, and addressed to someone uninvolved in the instant litigation, states: “Being early stage investors, we tend to invest in two guys and a dog.” (See Kent Decl. Ex. 69.) Fisher testified at deposition that a seed stage investment was an investment in “a few individuals tinkering with a product to, perhaps, maybe two dozen people; and that once the product got farther along in terms of more management, more people, more critical mass in terms of a product,” it would become an “early-stage” investment. (See Kent Decl. Ex. 2 at 370:22-371:8.) The Court nonetheless will assume for purposes of the instant motion that investments in “series B and higher” rounds are not “seed and early stage” investments. (See Rosenbaum Decl. ¶ 15); see also Liberty Lobby, 477 U.S. at 255 (noting court, in ruling on motion for summary judgment, must view evidence in the light most favorable to nonmoving party).

1 investments where the \$5 million upper number was exceeded," which constituted a total of
2 35% of all Fund VI monies invested. (See *id.* ¶ 24.)

3 Accordingly, the Court finds I-Enterprise has raised a triable issue of material fact as
4 to whether the Fund VI Offering Memorandum, but not the Fund V Offering Memorandum,
5 misrepresented that DFJ was a “seed stage” or “early stage” venture capital firm.

b. Due Diligence

7 I-Enterprise challenges as untrue the description in the Fund V and Fund VI Offering
8 Memoranda of the due diligence in which DFJ engaged prior to making an investment. The
9 Fund V and Fund VI Offering Memoranda state DFJ “has an eight-step procedure for due
10 diligence before making an investment decision,” which include the following steps: (1)
11 “Read Plan/Assess Team”; (2) “Evaluate Market”; (3) “Examine Business Model”; (4)
12 “Check References”; (5) “Call Potential Customers”; (6) “Evaluate Product/Technology”; (7)
13 “Evaluate Risks/Rewards”; (8) “Decide.” (See Fund V OM at 20-21; Fund VI OM at 20-21.)
14 The Fund V and Fund VI Offering Memoranda state that DFJ invests in fewer than 1% of
15 the companies it examines. (See Fund V OM at 20; Fund VI OM at 20.) I-Enterprise
16 contends that the eight-step due diligence process featured in the Fund V and Fund VI
17 Offering Memoranda had been abandoned by the time the Fund V and Fund VI Offering
18 Memoranda were distributed.

19 In particular, I-Enterprise points to DFJ’s 1999 investment in See-U-
20 There/TransComputing International (“TransComputing”).⁴ I-Enterprise cites a letter dated
21 February 27, 1999, in which the president and CEO of TransComputing thanked Jurvetson
22 for his visit, (see Kent Decl. Ex. 43), and a follow-up letter dated March 3, 1999, in which a
23 TransComputing employee thanked Jurvetson “for conducting . . . due diligence so quickly
24 and making a decision in ‘Internet time.’” (see *id.* Ex. 66), as evidence that DFJ could not
25 have performed the eight-step due diligence process described in the Fund V and Fund VI
26 Offering Memoranda. I-Enterprise further submits evidence that Jurvetson received a

⁴ Although I-Enterprise, in its motion, identifies the company in question as “See-U-There,” the documentation cited refers to the company as “TransComputing International.”

1 “binder of due-diligence related-documents” with respect to TransComputing in
 2 correspondence dated March 4, 1999, after DFJ had already decided to invest in the
 3 company. (See id. Ex. 43.) There is no evidence before the Court that DFJ invested in the
 4 company prior to reviewing the due diligence materials, however. Consequently,
 5 I-Enterprise has not demonstrated a triable issue as to whether DFJ failed to perform the
 6 promised due diligence with respect to this transaction.

7 I-Enterprise further notes that Jennifer Fonstad (“Fonstad”), a Fund V and Fund VI
 8 employee, testified at deposition that although “typically” she personally makes calls to
 9 references, she has delegated that duty to DFJ’s “affiliate network” and “venture partners
 10 where possible,” because “[t]here’s quite a lot to do to really assess these opportunities,
 11 and [DFJ] often need[s] to do it under a fairly tight time frame.” (See Kent Decl. Ex. 4
 12 (Fonstad Dep.) at 86:7-22.) Such statement does not evidence a lack of due diligence,
 13 however, but rather demonstrates that DFJ obtains assistance from others to ensure that it
 14 can complete its due diligence in a timely manner.

15 I-Enterprise also points to a series of internal emails dated March 13, 2003, in which
 16 Fisher requested information concerning a \$750,000 investment in CompassCare that was
 17 scheduled to close the following day. (See Kent Decl. Ex. 49.) In one of those emails,
 18 Fisher noted that the closing documents for the investment were on the desk of Mark
 19 Greenstein, the Chief Financial Officer for Funds V and VI, and stated: “[A]t least several of
 20 us partners around here don’t have the first clue as to what the company does” and “[w]e,
 21 as fiduciaries, are obligated to be up to speed on every company for whom we write a
 22 check.” (See id.) After receiving documentation about CompassCare in a followup email
 23 that same date, Fisher sent an additional email to “DFJ partners,” reminding them that “it’s
 24 important that everyone knows something about each of these co-investment deals before
 25 [DFJ] actually invest[s].” (See id.) Although the above-cited correspondence suggests
 26 certain difficulties in communication, nothing therein suggests that due diligence was not
 27 completed on the CompassCare investment.

28 I-Enterprise also notes that, with respect to a potential investment in Maptuit, Draper

1 sent the following email to Scott Johnson of DFJ New England, who had recommended the
 2 investment:

3 We ran it up the flagpole here at DFJ, and were universally opposed to it
 (except that John said he didn't want to be a bottleneck to your progress).
 4 Our question to you is, "Are you looking to us as a last line of defense here,
 or are we a rubber stamp, or something in between?" If we are a last line of
 5 defense, we would advise you to use us as the bad guy and kill it. If not, go
 ahead and do the deal. If you do, know that we are trying to save you from
 6 doing a deal that may create a nightmare for you. The founder's reputation
 being one of a long list of our concerns.

7 (See Kent Decl. Ex. 39.) Fund VI ultimately did invest in Maptuit. (See *id.* Ex. 1 (Draper
 8 Dep.) at 552:13-15.) Draper testified at deposition that "between the time [the email] was
 9 written and the time we invested, we were in Boston; we saw the company and were very
 10 impressed." (See *id.* at 552:17-19.) There is no evidence that defendants did not conduct
 11 such due diligence prior to making the decision to invest in Maptuit. Again, the evidence
 12 does not raise a triable issue of material fact as to DFJ's alleged lack of due diligence.

13 Accordingly, summary judgment for defendants will be granted on I-Enterprise's
 14 claim for negligent misrepresentation to the extent such claim is based on defendants'
 15 alleged misrepresentations about its process for conducting due diligence prior to investing
 16 in a company.

17 **c. "Intention to Work Hard on Fund VI"**

18 I-Enterprise argues that "[w]hile vigorously promoting their labor intensive, hands-on
 19 approach to early-stage investing, the individual defendants actually intended to pursue
 20 activities other than Fund VI, while continuing to reap increasingly large amounts of cash in
 21 the form of management fees." (See Opp. at 11.) The Court previously has dismissed all
 22 such claims. (See Order Granting in Part and Denying in Part Defendants' Motion for
 23 Partial Dismissal of Fourth Amended Complaint, filed November 3, 2005, ("November 2005
 24 Order") at 5-7; see also Order Granting in Part and Denying in Part Defendants' Motion to
 25 Dismiss Certain Counts of Third Amended Complaint and/or to Strike, Filed July 15, 2005,
 26 ("July 2005 Order") at 19-20.)

27 **d. Prior Investments**

1 I-Enterprise contends defendants made misrepresentations with respect to the
 2 success of their prior investments in three companies, specifically, Parametric, Hotmail,
 3 and Preview Travel.

4 **i. Parametric**

5 The Offering Memoranda for Fund V and Fund VI each state:

6 Another important reason why an early stage focus is alluring to us has to do
 7 with our notion of the “super deal” – a seed stage investment at a very low
 8 valuation in a company that later becomes exceedingly valuable. In his first
 9 fund Mr. Draper was a start-up investor in a three-man operation that became
 Parametric Technology, now a publicly traded company with a market value
 of some \$6 billion, and a deal in which Mr. Draper made more than 500 times
 his money on the original investment.

10 (See Fund V OM at 8; Fund VI OM at 9.)⁵ The Offering Memoranda further state: “We are
 11 avidly committed to early stage investing, knowing that while such ‘super deals’ are rare,
 12 they are only available to early stage investors.” (See Fund V OM at 8; Fund VI OM at 9
 13 (emphasis in originals).) I-Enterprise argues that the emphasis on the “super deal” was
 14 “critical to the overall investment proposition advertised in the Fund V and VI OMs,” and
 15 contends that the above-quoted statement as to Draper’s investment in Parametric was
 16 untrue because Draper was not “a start-up investor in a three-man operation that became
 17 Parametric” and did not “ma[k]e more than 500 times his money on the original
 18 investment.”

19 With respect to whether Draper was a “start-up investor” in Parametric, I-Enterprise
 20 notes that Parametric was incorporated in May 1985, and that, on October 27, 1986,
 21 Parametric issued 580,000 shares of Series A stock to four investors, including at least one
 22 other professional investor, S. Young Venture Fund I Limited Partnership; Draper was not
 23 one of those initial investors. (See Kent Decl. Ex. 41 (Parametric Form S-1, filed with SEC
 24 Dec. 7, 1989) at 7, 59.) On March 26, 1987 and May 14, 1987, Parametric sold a total of
 25 2,918,000 shares of Series B stock to other investors including California Partners, which

26
 27

 28 ⁵ The Fund VI OM identifies the then-current value of Parametric as \$7 billion. In all
 other respects, the quoted statement is identical in the Offering Memoranda for the two
 funds.

1 later became DFJ Fund I. (See id. at 59-60.) Taking as true Rosenbaum's statement that
 2 investments in Series B stock are "later stage financings," I-Enterprise has raised a triable
 3 issue of fact as to whether defendants misrepresented that Draper was "a start-up investor"
 4 in Parametric.⁶

5 I-Enterprise further argues that Draper did not make "more than 500 times his
 6 money on the original investment" in Parametric. On March 26, 1987, Fund I made its
 7 original investment in Parametric, in which it purchased 136,000 shares at \$1.25 per share,
 8 for a total investment of \$170,000. (See id. at 59-60.) On March 25, 1989, Fund I
 9 purchased an additional 68,000 shares of Series C stock in Parametric at \$1.50 per share,
 10 for a total investment on that date of \$102,000. (See id. at 60.) "500 times" an investment
 11 of \$170,000 is \$85 million; 500 times \$272,000 (the amount of Fund I's total investment in
 12 Parametric) is \$136 million. I-Enterprise points to financial records it identifies as records of
 13 Fund I, showing that the original March 26, 1987 investment in Parametric was sold on July
 14 1, 1989 at its original cost, and that the March 25, 1989 Series C investment in Parametric
 15 also was sold at cost.⁷ (See id. Ex. 54 at DFJ123137 at lines 410-411.) When Draper was
 16 asked at deposition whether he made \$85 million on Fund I's initial investment in
 17 Parametric and \$136 million on Fund I's total investment in Parametric, he testified that he
 18 did not know. (See Kent Decl. Ex. 1 (Draper Dep.) at 487:12-25.)

19 Although the Fund I records cited above indicate the Parametric investment was
 20 sold at cost, the Fund V and Fund VI Offering Memoranda contain statements to the
 21 contrary. Appendix B to the Fund V Offering Memorandum states that Fund I's \$272,000
 22 investment in Parametric was sold for \$26,846,000, which is 98.7 times the original
 23 investment, and that the value of that investment, if the stock had been held until June
 24

25 ⁶ The Court notes, however, that Appendix C to the Offering Memoranda does state
 26 that Fund I's investment in Parametric was not in the "1st Professional Round." (See Fund
 V OM App. C at IEC01000; Fund VI OM App. C at IEC01376.)

27 ⁷ Although defendants argue I-Enterprise's statement that the Parametric shares
 28 were sold at cost is incorrect, (see Fund V Reply at 9), they offer no evidence to the
 contrary.

1 1998, was more than \$170 million, *i.e.*, 626.6 times the original investment. (See Fund V
 2 OM App. B at B-1 - B-2.) Appendix B to the Fund VI Offering Memorandum states that
 3 Fund I's \$272,000 total investment in Parametric was worth \$22,930,700 "at Distribution,"
 4 or 84.3 times the original investment. (See Fund V OM App. B at B-2/3; Fund VI OM App.
 5 B-2/3.) When asked about these numbers at deposition, Draper testified that he did not
 6 know how the numbers were calculated, but that he knew "they were accurate at the time"
 7 and that they may have been calculated on an "as-if-held basis." (See Kent Decl. Ex. 1
 8 (Draper Dep.) at 486:2-488:9). A trier of fact could conclude that the statements in the text
 9 of the Offering Memoranda that Draper "made more than 500 times his money on the
 10 original investment," (see Fund V OM at 8; Fund VI OM at 9), are misleading, in light of the
 11 discrepancies in the evidence as to the actual dollar amount obtained from Fund I's sale of
 12 its Parametric shares and that none of the differing figures shows that Draper "made more
 13 than 500 times his money on the original investment."

14 Accordingly, the Court finds I-Enterprise has raised a triable issue of material fact as
 15 to whether the statements in the Offering Memoranda for Fund V and Fund VI that Draper
 16 was "a start-up investor" in Parametric, and that "Draper made more than 500 times his
 17 money on the original investment," constitute misrepresentations.

18 **ii. Hotmail**

19 The Fund VI Offering Memorandum contains the following statement about Fund III's
 20 investment in Hotmail: "Fund III invested \$300k in the seed round of Hotmail Corporation,
 21 an investment that became worth 200 times that amount 22 months later, and over 350
 22 times by 6/30/99." (See Fund VI OM at 9.) I-Enterprise contends the above-quoted
 23 statement is untrue.⁸

24
 25 ⁸ Defendants note that I-Enterprise has never previously argued the Hotmail
 26 investment was a basis for any of its claims and that it failed to identify the Hotmail
 27 investment, in its discovery responses, as the basis for any of its claims. Consequently,
 28 defendants argue, I-Enterprise should be barred from asserting this theory for the first time
 in opposition to defendants' motion for summary judgment. In light of the policy in favor of
 amending complaints, however, *see* Fed. R. Civ. P. 15(a), and as defendants do not claim
 to have been prejudiced by I-Enterprise's late assertion of the claim, the Court finds
 I-Enterprise is not barred from raising this theory. *See Eminence Capital, LLC v. Aspeon,*

1 As I-Enterprise points out, the Fund III Quarterly Report for the quarter ended June
2 30, 1999 states that its investment in Hotmail was then worth approximately \$103 million,
3 based on a total investment of \$3.3 million, not based on the \$300,000 initial investment as
4 stated in the Fund VI Offering Memorandum. (See Kent Decl. Ex. 45 at 1.) \$103 million is
5 approximately 31.2 times the \$3.3 million total cost of the investment, and approximately
6 343 times the \$300,000 initial investment. If the statement in the Fund III Quarterly Report
7 is true, the \$103 million figure includes the return on \$3 million in shares purchased after
8 the initial investment, and one could not say that the \$300,000 initial investment alone was
9 worth 350 times that amount on June 30, 1999. When asked about the ten-fold difference
10 between the description of Fund III's Hotmail investment set forth in the Fund VI Offering
11 Memorandum, as compared to the description of the same investment in the Fund III
12 Quarterly Report, Jurvetson testified: "I think what I would say is that I'm confused by the
13 sentence [in the Fund VI Offering Memorandum], and I think any investor reading it would
14 ask us for clarification before investing with us." (See Kent Decl. Ex. 3 (Jurvetson Dep.) at
15 648:12-15.) Draper testified at deposition that he believed the statements in both
16 documents are correct, but was unable to explain how to reconcile the two statements.⁹
17 (See Kent Decl. Ex. 1 (Draper Dep.) at 288:2-293:7.)

18 Accordingly, the Court finds I-Enterprise has raised a triable issue of material fact as
19 to whether defendants misrepresented in the Fund VI Offering Memoranda that Fund III's
20 \$300,000 initial investment in Hotmail was worth 350 times that amount by June 30, 1999.

iii. Preview Travel

24 Inc., 316 F.3d 1048, 1052 (9th Cir. 2003) (stating that in determining whether to allow
25 amendment, “the consideration of prejudice to the opposing party carries the greatest
weight”).

With respect to Preview Travel, the Offering Memoranda for Fund V and Fund VI states “[w]e were seed investors in 1994 with . . . Preview Travel,” and further states that Fund I invested in Preview Travel in the “1st Professional Round.” (See Fund V OM at 9 and App. C at C2; Fund VI OM at 11 and App. C at C2.) I-Enterprise contends that both of these statements are untrue.

6 In particular, I-Enterprise asserts that Fund I's original investment in Preview Travel
7 was a "small fraction of a later-stage Series C round in 1991 by Kleiner Perkins Caufield &
8 Byers," (see Opp. at 19); I-Enterprise submits no evidence in support of this contention.
9 I-Enterprise also points out, however, that earlier Offering Memoranda, for Funds III and IV,
10 stated that Fund I's investment in Preview Travel was not in the "1st Professional Round,"
11 (see Kent Decl. Ex. 52 (Fund III Offering Memorandum) App. C at C-3; Kent Decl. Ex. 34
12 (Fund IV Offering Memorandum) App. C at C3); these appendixes were changed for
13 inclusion in the Fund V and Fund VI Offering Memoranda to state that Fund I invested in
14 Preview Travel in the "1st Professional Round." (See Fund V OM App. C at C2; Fund VI
15 OM App. C at C2.) Defendants offer no explanation for the discrepancy.

16 Accordingly, the Court finds I-Enterprise has raised a triable issue of material fact as
17 to whether defendants misrepresented in the Fund V and Fund VI Offering Memoranda that
18 they were “seed investor[s]” and investors in the “1st Professional Round” of Preview
19 Travel.

e. **Failure to Disclose Diversion of Fund V Monies**

21 I-Enterprise contends that defendants, in the marketing of Fund VI, failed to disclose
22 that they had diverted Fund V monies to purchase shares of Wit Capital and Digital Impact
23 for others, rather than investing the money for the benefit of the limited partners of Fund V.

24 Specifically, I-Enterprise contends that on September 11, 1998, DFJ used \$375,000
25 of Fund V money to purchase shares of Wit Capital for “themselves, friends, and family
26 members.” (See Opp. at 20.) I-Enterprise submits evidence that, on September 11, 1998,
27 \$5 million was transferred from Fund V to Wit Capital for the “Series C Shareholder”
28 Account, and that as of September 17, 1998, that money had been used to purchase

1 \$4,625,000 in Wit Capital shares for Fund V, and \$375,000 in such shares for Draper
 2 Fisher Jurvetson Partners, LLC. (See Kent Decl. Exs. 19, 20.) I-Enterprise further submits
 3 interrogatory responses from Fund V, in which Fund V states that, on September 11, 1998,
 4 it granted a “[s]hort-term loan of \$375,000 from Fund V to Partners V for Wit Capital
 5 financing,” and further states that said loan was repaid on October 14, 1998. (See Kent
 6 Decl. Ex. 56 at 10:19-22.) Additionally, Fund V states that on November 23, 2004, it was
 7 paid \$2,113.65 in interest for the above-referenced loan. (See id. at 10:23-24.)
 8 I-Enterprise submits evidence that if Fund V had received the benefit of the above-
 9 referenced \$375,000 investment, it would have earned an additional \$3.9 to \$4.9 million by
 10 the beginning of 2000. (See Greenfield Decl. Ex. 14 (Fund V Q3 1999 Report) at IEC0504
 11 (showing Wit Capital stock purchased 9/11/98 increased in value from \$1.43 to \$18.25 per
 12 share); see also id. Ex. 17 (Fund V Q1 2000 Report) at IEC0567 (showing Wit Capital stock
 13 at \$17.125 per share); Ex. 15 (Fund V Q4 1999 Report) at IEC0513 (showing Wit Capital
 14 stock at \$17.00 per share)).

15 I-Enterprise also submits evidence that defendants used Fund V funds to purchase
 16 Digital Impact stock for Fund IV. Specifically, I-Enterprise submits interrogatory responses
 17 from Fund V, in which Fund V stated that, on July 1, 1999, it granted a “[s]hort-term loan of
 18 \$1,590,300 to Fund IV for investment in Digital Impact,” that the loan was repaid on
 19 September 9, 1999, and that Fund IV, on July 20, 2004, paid Fund V \$16,468 in interest on
 20 the above-referenced loan. (See Kent Decl. Ex. 56 at 9:20-25.)

21 As I-Enterprise notes, Fund V’s Rule 30(b)(6) witness, Mark Greenstein, testified at
 22 deposition: “I don’t believe a loan should normally be made between funds.” (See Kent
 23 Decl. Ex. 5 at 125:6-7.)¹⁰ I-Enterprise fails to identify, however, any statement made by
 24 defendants that was rendered untrue as a result of their failure to disclose the above-
 25 referenced uses of Fund V monies.

26
 27 ¹⁰ When Draper was asked at deposition whether he thought there was “any
 28 problem, from a fiduciary point of view, in Fund V lending money to Fund VI,” he testified: “I
 think we are well within contract to do that.” (See Kent Decl. Ex. 1 at 556:12-18.)

1 Consequently, summary judgment for defendants will be granted on I-Enterprise's
2 claim for negligent misrepresentation, to the extent such claim is based on defendants'
3 failure to disclose they had diverted Fund V monies to purchase shares of Wit Capital and
4 Digital Impact for others, rather than investing the money for the benefit of the limited
5 partners of Fund V. See BAJI 12.45 (noting negligent misrepresentation claim requires
6 proof of untrue representation as to past or existing material fact); see also Byrum v. Brand,
7 219 Cal. App. 3d 926, 940-942 (1990) (rejecting contention that "negligent
8 misrepresentation may be shown where a fiduciary fails or omits to disclose certain
9 material facts"); Vega v. Jones, Day, Reavis & Pogue, 121 Cal. App. 4th 282, 291 n.6
10 (2004) (noting claim for negligent misrepresentation "requires a positive assertion").

f. Failure to Disclose Misappropriation of “Compensation and Benefits” Belonging to Fund V

12 I-Enterprise contends defendants failed to disclose that Netzero offered Fund V
13 employee Jennifer Fonstad (“Fonstad”) 25,000 directed shares¹¹ in Netzero that Fonstad
14 took as her own rather than treating as a Fund V asset. Fonstad testified at deposition that
15 she offered the shares to others, including her daughter and nanny, and could not recall
16 whether she had made the shares available to Fund V. (See Kent Decl. Ex. 4 (Fonstad
17 Dep.) at 471:8-25, 473:2-11; see also Kent Decl. ¶ 74 (Document entitled “Netzero, Inc.
18 Directed Share Program”).

I-Enterprise contends the Fund V LPA establishes that the right to obtain directed shares is an asset of the fund.¹² Section 6.1(d) of the Fund V LPA provides that the management fees paid by Fund V to the General Partner “shall be reduced by the amount of any directors’ fees (including net after-tax proceeds obtained by the General Partner or the Managing Members in connection with the exercise of stock options and sale of the

¹¹ According to I-Enterprise, directed shares of a company give the holder the right to purchase the company's stock at the initial offering price. (See Opp. at 21.)

27 ¹² Although I-Enterprise refers to the “Fund VI LPA,” (see Opp. at 21), the Court fails
28 to see the relevance of the Fund VI LPA to a determination of what constitutes an asset of
Fund V, and assumes I-Enterprise intended to refer to the Fund V LPA.

1 underlying shares), consulting fees, break-up fees, investment banking fees or other
 2 equivalent compensation (other than direct reimbursement of out-of-pocket expenses)
 3 received by the General Partner, any of the Managing Members or any of their respective
 4 Affiliates from any company or entity in which the Partnership has an interest.” (See
 5 Greenstein Decl. Ex. 4 (Fund V LPA) at 9 ¶ 6.1(d).) The above-quoted paragraph of the
 6 Fund V LPA reasonably could be construed to require that the amount of management fees
 7 paid by Fund V be reduced by the net after-tax proceeds obtained by the General Partner
 8 or the Managing Members as a result of their acquisition of directed shares from any
 9 company in which Fund V has an interest.

10 Again, however, I-Enterprise has not identified any statement made by defendants
 11 that was rendered untrue as a result of their failure to disclose the above-referenced use of
 12 directed shares. As discussed in the previous section, a “positive assertion” of material fact
 13 is a prerequisite to a claim for negligent misrepresentation. Consequently, summary
 14 judgment for defendants will be granted on I-Enterprise’s claim for negligent
 15 misrepresentation, to the extent said claim is based on the above-alleged omission.

16 **g. Capital Calls**

17 I-Enterprise contends that defendants made repeated misrepresentations about the
 18 General Partners’ capital contributions to Fund V and Fund VI. The LPAs for both Fund V
 19 and Fund VI require the General Partner of each of those Funds to make certain capital
 20 contributions to the funds “in cash or by full recourse demand promissory note.” (See
 21 Greenstein Decl. Ex. 4 (Fund V LPA) ¶ 4.3; Greenstein Decl. Ex. 87 (Fund VI LPA) ¶ 4.3.)
 22 Although the financial statements for the funds repeatedly represented that “[t]he General
 23 Partner’s capital contributions were made in the form of demand promissory notes” or “non-
 24 interest bearing promissory notes,”¹³ Greenstein, the Fund V and Fund VI CFO, testified at
 25

26 ¹³ See Greenstein Decl. Ex. 54 (1998 Fund V Financial Statements) at IEC00434; *id.*
 27 Ex. 55 (1999 Fund V Financial Statements) at IEC0408; *id.* Ex. 58 (2000 Fund V Financial
 28 Statements) at IEC00395; *id.* Ex. 59 (2001 Fund V Financial Statements) at IEC00536; *id.*
 Ex. 60 (2002 Fund V Financial Statements) at ML DF 0346); Greenstein Decl. Ex. 114
 (1999 Fund VI Financial Statements) at IEC01238).

1 deposition that as of December 2002, DFJ-V had not furnished any promissory notes to
 2 Fund V, and that he had been aware of the lack of promissory notes since the end of 1999.
 3 (See Kent Decl. Ex. 5 (Greenstein Dep.) at 242:9-244:3.) In his declaration, Greenstein
 4 attests that the DFJ-V did execute one promissory note in 1999, albeit in the wrong form,
 5 but failed to execute promissory notes for thirteen capital calls between January 2000 and
 6 January 2003. (See Greenstein Decl. ¶¶ 83-85.) With respect to Fund VI, Greenstein
 7 attests that DFJ-VI executed one promissory note on or about December 31, 1999, albeit
 8 using the wrong form of note, and thereafter failed to execute any promissory notes for
 9 “approximately eighteen capital contributions that were called between January 2000 and
 10 2003.” (See Greenstein Decl. ¶¶ 152-155.)

11 In late December 2002, I-Enterprise began to make inquiries of DFJ with respect to
 12 the operation of Funds V and VI. (See Roy Decl. ¶ 8.) In that regard, Maureen Herbert
 13 (“Herbert”), an I-Enterprise employee, sent an email to Greenstein on December 6, 2002, in
 14 which she requested “copies of a couple signed Fund V and Fund VI GP Capital
 15 Contribution notes.” (See Kent Decl. Ex. 22 at DJF112134.) In an email dated December
 16 13, 2002, Greenstein told Herbert: “We’ll have an example pulled from our files and sent to
 17 you.” (See Kent Decl. Ex. 24 at DFJ112183.) At deposition, Greenstein testified that no
 18 executed notes existed at that time with respect to either fund, and that he had a note
 19 created in order to send a copy to her. (See Kent Decl. Ex. 5 at 251:6-22, 247:9-248:2.) In
 20 January 2003, Greenstein attests, DFJ-V and DFJ-VI executed demand full recourse
 21 promissory notes representing all capital contributions they owed as of that date. (See
 22 Greenstein Decl. ¶¶ 86, 155.)

23 Based on this evidence, a reasonable trier of fact could conclude that defendants
 24 misrepresented, in the Fund V and Fund VI Financial Statements, that the General
 25 Partners had executed promissory notes as their capital contributions. Accordingly, the
 26 Court will deny defendants’ motion for summary judgment as to I-Enterprise’s claim for
 27 negligent misrepresentation, to the extent such claim is based on misrepresentations about
 28 the General Partners’ capital contributions to Fund V and Fund VI.

h. Other Alleged Misrepresentations

2 Defendants' motions also seek summary judgment on I-Enterprise's claims to the
3 extent such claims are based on certain other alleged misrepresentations. I-Enterprise has
4 submitted no opposition thereto. These claims are discussed below.

(i) IRRs

6 I-Enterprise alleges defendants misrepresented, inter alia, the internal rates of return
7 (“IRR”) of the prior DFJ funds. (See 4AC ¶ 167.) Defendants contend that I-Enterprise
8 cannot establish that the IRR information contained in the Offering Memoranda was false or
9 misleading, in light of the disclosure in Appendix B of the method used to calculate IRRs,
10 and the testimony of I-Enterprise’s own expert that there is more than one proper method
11 for calculating IRRs. (See Fund V OM App. B at B-1; Fund VI OM App. B at IEC01368B-1;
12 see also Wanger Decl. Ex. 42 (Puntillo Dep.) at 66:21-23.) Moreover, Draper, Fisher, and
13 Jurvetson all attest that the statements and calculations in the Offering Memoranda about
14 IRRs were true at the time they were made. (See Draper Decl. ¶ 15; Fisher Decl. ¶ 14;
15 Jurvetson Decl. ¶ 14.) As I-Enterprise has offered no evidence to the contrary, the Court
16 will grant defendants’ motion for summary judgment on the issue of whether it made
17 misrepresentations in the Offering Memoranda with respect to IRRs.

(ii) Calculation of Management Fees

19 I-Enterprise alleges that defendants failed to disclose various facts concerning the
20 calculation of management fees and expenses that were necessary to make the
21 representations about management fees in the Offering Memoranda not misleading. (See
22 4AC ¶ 171.) The Offering Memoranda state that “[t]he annual management fee will be
23 equal to 2.5% of the committed capital of the Partnership . . . payable quarterly, in
24 advance.” (See Fund V OM at D-6; Fund VI OM at D-6.) Each of the individual defendants
25 attests that the Offering Memoranda accurately described how the management fees would
26 be calculated and paid. (See Draper Decl. ¶ 27; Fisher Decl. ¶ 25; Jurvetson Decl. ¶ 25.)
27 As I-Enterprise has offered no evidence to the contrary, the Court will grant defendants’
28 motion for summary judgment on the issue of whether it made misrepresentations in the

1 Offering Memoranda with respect to the calculation of management fees.

2 **(iii) Valuation of Wit Capital**

3 I-Enterprise alleges that the valuation of Fund V portfolio company Wit Capital, as
 4 set forth in the Fund VI Offering Memorandum, "was not determined in accordance with the
 5 Fund V Agreement," and that it was overvalued by nearly \$100 million. (See 4 AC ¶ 166.)
 6 Defendants submit evidence that they calculated the value of Wit Capital in precisely the
 7 manner I-Enterprise's expert testified was the appropriate valuation method. (See Draper
 8 Decl. ¶ 30; Fisher Decl. ¶ 28; Jurvetson Decl. ¶ 28; Wanger Decl. Ex. 44 (Porter Dep.) at
 9 57:8-58:16.) As I-Enterprise has offered no evidence to the contrary, the Court will grant
 10 defendants' motion for summary judgment on the issue of whether it made
 11 misrepresentations in the Fund VI Offering Memorandum with respect to the valuation of
 12 Wit Capital.

13 **i. Summary**

14 In sum, I-Enterprise has raised a triable issue as to whether defendants made the
 15 following alleged misrepresentations: (1) statements in the Fund VI OM that DFJ was a
 16 "seed stage" or "early stage" venture capital firm; (2) statements in the Offering Memoranda
 17 for Fund V and Fund VI that Draper was "a start-up investor" in Parametric, and that
 18 "Draper made more than 500 times his money on the original investment" in Parametric; (3)
 19 the statement in the Fund VI Offering Memoranda that Fund III's \$300,000 initial investment
 20 in Hotmail was worth 350 times that amount by June 30, 1999; (4) statements in the Fund
 21 V and Fund VI Offering Memoranda that defendants were "seed investors" and investors in
 22 the "1st Professional Round" of Preview Travel; (5) statements in the Fund V and Fund VI
 23 Financial Statements that the General Partners had executed promissory notes as their
 24 capital contributions.

25
 26 **2. Reliance on Misrepresentations in Offering Memoranda**

27 Defendants argue that I-Enterprise cannot rely on any misrepresentations in the
 28

1 Offering Memoranda because each of the LPAs contains an integration clause.¹⁴
 2 Defendants' argument is not persuasive. The alleged negligent misrepresentations in the
 3 Offering Memoranda are statements of existing fact to which the integration clause has no
 4 application, e.g., defendants' statements that DFJ is a "seed stage" or "early stage" venture
 5 capital firm, and their various statements about the success of prior investments.
 6 Consequently, unless I-Enterprise was unreasonable in relying on such statements at the
 7 time it entered into the LPAs, the statements, assuming the other elements of a cause of
 8 action for negligent misrepresentation are met, are actionable.

9 In that regard, as the Court noted in a prior order, the LPAs state that "in making an
 10 investment decision investors must rely on their own examination of the issuer and the
 11 terms of the offering, including the merits and risks involved." (See Order Granting in Part
 12 and Denying in Part LLC Defendants' Motion to Dismiss; Granting Individual Defendants'
 13 Motion to Dismiss, filed October 23, 2003, ("October 2003 Order") at 11 (quoting Fund V
 14 LPA at 31 and Fund VI LPA at 35)). The Court went on to hold that it could not "find, as a
 15 matter of law, that I-Enterprise unreasonably relied on statements in the offering
 16 memoranda, when the limited partnership agreement itself instructed investors to rely on
 17 the terms of the offering." (See *id.* at 12-13.)¹⁵ Accordingly, defendants are not entitled to
 18 summary judgment on the ground I-Enterprise's claims are barred by the integration
 19 clause.¹⁶

20
 21 ¹⁴ The Fund V and Fund VI LPAs both contain a provision that the agreement
 22 "constitutes the full, complete, and final agreement of the Partners and supersedes all prior
 23 agreements between the Partners with respect to the Partnership." (See Greenstein Decl.
 24 Ex. 4 (Fund V LPA) § 15.11; Greenstein Decl. Ex. 87 (Fund VI LPA) § 15.11.)

25 ¹⁵ In addition, as I-Enterprise notes, the Fund VI Subscription Agreement provides:
 26 "The undersigned agrees to subscribe for the Limited Partnership Interests pursuant to the
 27 terms of the Confidential Private Offering Memorandum and the attachments, exhibits, or
 28 amendments thereto, if any[.]" (See Greenstein Decl. Ex. 81 (Fund VI Subscription
 Agreement) at IEC01316.)

29 ¹⁶ To the extent I-Enterprise may be asserting a fraud claim, *see infra*, based on a
 30 theory of a promise made without intent to perform, the Court need not decide whether the
 31 integration clause precludes I-Enterprise from relying on such promise. The only arguable
 32 promise alleged concerns defendants' investment strategy. (See Fund V OM at 7; Fund VI
 33 OM at 8.) For the reasons set forth *infra*, however, any claim based on such promise is

3. Statute of Limitations

2 Defendants argue that certain of I-Enterprise's misrepresentation claims are barred
3 by the statute of limitations. Both parties agree that such claims are governed by the three-
4 year statute of limitations, set forth in California Code of Civil Procedure § 338(d), for claims
5 based on fraud or mistake. The parties disagree, however, as to whether inquiry notice or
6 actual notice of the alleged misrepresentations is sufficient to trigger the running of the
7 statute of limitations.

Under California statutory law, a cause of action for fraud or mistake “is not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.” See Cal. Code Civ. Proc. § 338(d). Courts, however, have “read into the statute a duty to exercise diligence to discover the facts.” See Parsons v. Tickner, 31 Cal. App. 4th 1513, 1525 (1995). As defendants point out, the California Supreme Court has held, in a suit alleging claims for fraud and negligent misrepresentation, that inquiry notice is sufficient to trigger the running of the statute of limitations set forth in § 338(d). See Miller v. Bechtel Corp., 33 Cal. 3d 868, 875 (1983) (noting that if plaintiff therein “became aware of facts which would make a reasonably prudent person suspicious, she had a duty to investigate further, and she was charged with knowledge of matters which would have been revealed by such an investigation”).

19 Plaintiff, for its part, relies on Eisenbaum v. Western Energy Resources, Inc., 218
20 Cal. App. 3d 314 (1990). In Eisenbaum, the California Court of Appeal held that, in cases
21 involving a fiduciary relationship between the parties, “facts which ordinarily require
22 investigation may not incite suspicion” and “the usual duty of diligence to discover facts
23 does not exist”; consequently, “the limitations period does not begin to run until plaintiff
24 actually discovers the facts constituting the cause of action, even though the means for

as || time-barred.

1 obtaining the information are available." See id.¹⁷ In Miller, however, the Supreme Court
 2 expressly considered the argument made by the plaintiff therein that she had no duty of
 3 inquiry because the defendant had a fiduciary duty to provide her with full and correct
 4 information, and held such plaintiff nonetheless had a duty to investigate if she became
 5 aware of facts that would "make a reasonably prudent person suspicious," and that she
 6 was "charged with knowledge of matters which would have been revealed by such an
 7 investigation." See id. at 875; see also Parsons, 31 Cal. App. 4th at 1526 (noting § 338(d)
 8 discovery rule "is generally applicable to confidential or fiduciary relationships").
 9 Accordingly, the Court concludes that the statute of limitations began to run at such time as
 10 I-Enterprise was made aware of facts that would have made a reasonably prudent person
 11 suspicious and an investigation into the matter would have revealed the asserted
 12 misrepresentation. See Miller, 33 Cal. 3d at 875.¹⁸

13 **a. Investment Objectives**

14 Defendants argue that I-Enterprise knew or should have known that Fund V had
 15 deviated from the investment objectives set forth in the Fund V Offering Memorandum
 16 before I-Enterprise invested in Fund VI. In particular, defendants note that Rosenbaum,
 17 I-Enterprise's own expert, acknowledges in his report that, by July 1999, the date of the
 18 Fund VI OM, the Fund V Quarterly Reports had disclosed that eight out of eighteen
 19 investments made by Fund V were in Series B or higher rounds. (See Wanger Decl. Ex. 36
 20 (Rosenbaum report) at 17.) Defendants further point out that the 1998 and 1999 Fund V
 21 Financial Statements identify the round in which Fund V invested in each of the companies
 22 in which it invested. (See Greenstein Decl. Ex. 54 at IEC00427; id. Ex. 55 at IEC0400-
 23 0403.) Defendants further note that the Fund VI Offering Memorandum expressly
 24 disclosed that defendants, in their prior funds, did not always invest in the "1st professional

25
 26 ¹⁷ In Eisenbaum, the Court of Appeal was not interpreting § 338(d), but, rather, the
 27 one-year statute of limitations set forth in California Corporations Code § 25507(a). See id.
 28 at 321.

18 Although the Court previously has cited Eisenbaum, (see July 2005 Order at 18),
 2 the California Supreme Court's decision in Miller is controlling authority on this issue.

1 round.” (See Fund VI OM App. C.) Defendants also argue that the Fund VI Offering
2 Memorandum and the Fund V Quarterly Reports disclosed that Fund V repeatedly had
3 exceeded the typical maximum initial investment. (See Fund VI OM at IEC 01374; see also
4 Fund V OM at 23; Greenstein Decl. Exs. 10-13 (Fund V Quarterly Reports from Q3 1998
5 through Q2 1999.) Defendants contend such disclosures put I-Enterprise on notice, more
6 than three years before the instant action was filed,¹⁹ that Fund V had deviated from its
7 stated investment objectives, and that, accordingly, I-Enterprise’s negligent
8 misrepresentation claims based on misrepresentations about investment objectives should
9 be dismissed as time-barred.

10 Defendants attest that Fund V and Fund VI Quarterly Reports were sent to all limited
11 partners, and that I-Enterprise's Quarterly Reports were sent to Roy's counsel and broker,
12 at the request of Roy's counsel. (See Greenstein Decl. ¶¶ 21, 24, 112, 115.) In response,
13 I-Enterprise argues that the Fund V Quarterly Reports were sent only to its counsel and its
14 broker at Merrill Lynch; Roy attests that he "did not receive all quarterly or annual reports
15 from Fund V or Fund VI in a timely fashion" and that DFJ "first sent a significant number of
16 them to [Roy] when requested around November 2002." (See Roy Decl. ¶ 7; see also
17 Greenstein Decl. Ex. 81 (letter to DFJ-VI, dated July 26, 1999, from counsel to
18 I-Enterprise's predecessor, Intercontinental Energy Corporation, requesting that he and
19 Greg Simmons of Merrill Lynch be copied on all notices issued by the Fund); Kent Decl. Ex.
20 10 (email from Janette Shutts of DFJ stating that Roy is "never mailed the info" and that the
21 "only contact information [she had] ever received is for Peter DeFeo and Greg Simmons").
22 Roy acknowledges in his declaration, however, that his deposition testimony as to whether
23 he regularly received and reviewed reports from defendants reflected "some confusion" as
24 to whether he had received and reviewed all such reports (See Roy Decl. at 4 n.1; see
25 also e.g. Kent Decl. Ex. 9 (Roy Dep.) at 539:9-13 ("I think it's reasonable to assume I

27 ¹⁹ Defendants filed the instant action April 11, 2003, seeking declaratory relief.
28 I-Enterprise filed its counterclaim July 23, 2003. The parties were realigned by stipulation
and order filed January 28, 2005.

1 received many of them, but which ones I received in the normal course of business and
 2 which ones [counsel] got from Draper Fisher at a later time, I don't know."); *id.* at 763:2-10
 3 ("[D]uring discovery we have learned that Draper Fisher says they never sent me quarterly
 4 reports").

5 As defendants correctly note, even if the quarterly reports were sent only to Roy's
 6 lawyer and broker, such individuals were acting as Roy's agents, and any notice provided
 7 to them on Roy's behalf was imputed to Roy.²⁰ See Capron v. State of California, 247 Cal.
 8 App. 2d 212 (1966) (finding, under predecessor to § 338(d), claim time-barred due to
 9 knowledge of plaintiffs' agent); see also Cal Civ. Code § 2332 ("As against a principal, both
 10 principal and agent are deemed to have notice of whatever either has notice of, and ought,
 11 in good faith and the exercise of ordinary care and diligence, to communicate to the
 12 other."); Knapp v. Doherty, 123 Cal. App. 4th 76, 95 (2004) (citing § 2332; finding client had
 13 notice of trustee's sale where notice provided to bankruptcy counsel); Columbia Pictures
 14 Corp. v. De Toth, 87 Cal. App. 2d 620, 630 (1948) (holding "principal is charged with and is
 15 bound by the knowledge of, or notice to, his agent received while the agent is acting within
 16 the scope of his authority and which is with reference to a matter over which his authority
 17 extends," irrespective of whether agent actually communicates the matter to principal).
 18 Accordingly, the Court finds that Roy is charged with knowledge of the contents of
 19 documents about the funds that were sent to his lawyer and broker.

20 I-Enterprise next argues, relying on two Ninth Circuit cases, that there are triable
 21 issues of fact as to what conclusions should be drawn from the receipt of such reports. As
 22 I-Enterprise notes, in Briskin v. Ernst & Ernst, 589 F.2d 1363 (9th Cir. 1978), the district
 23 court granted summary judgment for the defendant in a federal securities fraud action on
 24 the ground the claim was time-barred²¹ due to the plaintiffs' receipt of certain documents;

25
 26 ²⁰ In addition, I-Enterprise has cited no authority requiring defendants to provide their
 27 limited partners with multiple copies of reports.

28 ²¹ Although the complaint in Briskin alleged a claim for violation of § 10(b) of the
 29 Securities Exchange Act of 1934, the Ninth Circuit applied the statute of limitations set forth
 in the predecessor to § 338(d). See id. at 1365.

1 the Ninth Circuit reversed, finding a triable issue as to whether the information contained in
 2 the documents was sufficient to make a reasonably prudent person suspect fraud. See id.
 3 at 1368. In that regard, the Ninth Circuit stated, “A trial judge should not assign conclusive
 4 legal effect to such documents at the summary-judgment stage when there can be a
 5 genuine difference of opinion as to their impact on a reasonable person.” See id. at 1368.
 6 Similarly, in Gray v. First Winthrop Corp., 82 F.3d 877, 881 n.3 (9th Cir. 1996), the Ninth
 7 Circuit noted that even when statements at issue are contained in undisputed documents,
 8 the jury still may need “to evaluate ‘investor reasonableness’ in light of the documents and
 9 other relevant evidence.” As Gray further observed, however, “the specificity of the
 10 information given is a relevant factor in determining when a reasonable investor should
 11 begin to investigate the possibility of fraud in an investment.” See Gray, 82 F.3d at 882.

12 I-Enterprise argues that the Court cannot hold as a matter of law that the limited
 13 information contained in the Quarterly Reports and Financial Statements was sufficient to
 14 put I-Enterprise on notice that defendants may have misrepresented their intent to make
 15 seed-stage investments. The Court disagrees. Of the seven investments listed in the Fund
 16 V Q4 1998 Quarterly Report, for example, Rosenbaum identifies five as being non-seed
 17 stage investments: Cyras, Eclipse, Global Sight, Brodia/Transactor Networks, and Wit
 18 Capital. (See Wanger Decl. Ex. 36 (Rosenbaum report) at 17.) The Fund V Q4 1998
 19 Quarterly Report expressly discloses that four of those five investments were made in a
 20 Series B or higher round, which, Rosenbaum attests, is the definition of a later stage
 21 investment. (See Greenstein Decl. Ex. 11 at IEC00416; see also Rosenbaum Decl. ¶ 15.)
 22 The Fund V Financial Statements for 1998 and 1999 likewise expressly disclose whether
 23 each investment was made in a Series B or higher round. (See Greenstein Decl. Ex. 54 at
 24 IEC00427; id. Ex. 55 at IEC0400-0403.) A reasonable investor concerned about whether
 25 defendants were investing in seed stage investments would have been put on notice by
 26 these disclosures that defendants frequently invested in Series B or higher rounds, which,
 27 according to plaintiff’s own expert, are not seed stage investments. See, e.g., Davis v. Birr,
 28 Wilson & Co., 839 F.2d 1369, 1370 (9th Cir. 1988) (finding § 10(b) claim time-barred under

1 predecessor to Cal. Code Civ. Proc. § 338(d) where investor received monthly reports and
 2 consequently was made aware of challenged transactions more than three years before
 3 filing suit). Accordingly, as I-Enterprise received such disclosures more than three years
 4 before it filed its claims in the instant action, the Court finds I-Enterprise's negligent
 5 misrepresentation claims, to the extent such claims are based on misrepresentations in the
 6 Fund VI OM that DFJ was a "seed stage" or "early stage" venture capital firm, are time-
 7 barred.

8 Defendants additionally argue that the Fund VI Offering Memorandum and the
 9 Fund V Quarterly Reports disclosed that Fund V repeatedly had exceeded the typical
 10 maximum initial investment. (See Fund VI OM at IEC 01374; see also Greenstein Decl.
 11 Exs. 10-13 (Fund V Quarterly Reports from Q3 1998 through Q2 1999.) With respect to the
 12 Offering Memorandum, the chart on the cited page of the Fund VI Offering Memorandum
 13 does not indicate whether the "cost" of the investments listed therein refers to the initial
 14 investment or the total investment in those companies. The Fund V Quarterly Reports, on
 15 the other hand, state the dollar amount of each new investment. (See, e.g., Greenstein
 16 Decl. Ex. 10 (Fund V Q3 1998 Quarterly Report) at IEC00472, 474, 476 (noting \$4.6 million
 17 investment in Wit Capital); Greenstein Decl. Ex. 11 (Fund V Q4 1998 Quarterly Report) at
 18 IEC00410, 412, 414,416) (noting \$4.63 million investment in Eclipse, \$3.52 million
 19 investment in Tacit Knowledge, and \$4.63 million investment in Transactor Networks)). A
 20 reasonable investor concerned about the size of Fund V's transactions would be hard-
 21 pressed not to notice that the amounts invested repeatedly exceeded the typical maximum
 22 initial investment. Accordingly, because I-Enterprise was aware, more than three years
 23 before filing its claims in the instant lawsuit, that Fund V's initial investments often
 24 exceeded the amount of its stated typical maximum initial investment, the Court finds that
 25 I-Enterprise's negligent misrepresentation claims, to the extent such claims are based on
 26 misrepresentations about the size of initial investments, is time-barred.

27 Accordingly, defendants' motion for summary judgment as to I-Enterprise's negligent
 28 misrepresentation claims, to the extent such claims are based on misrepresentations about

1 investment objectives, will be granted.²²

2 **b. Capital Calls**

3 Defendants argue that I-Enterprise was “on actual notice regarding the improper
 4 form of notes contributed by the General Partner over three years before it brought its
 5 claims.” (See Fund V Motion at 15.) Defendants point out that the 1999 Fund VI Financial
 6 Statements disclosed that “the general partners’ capital contributions have been paid in the
 7 form of non-interest bearing promissory notes due upon the earlier of 30 days after the
 8 termination of the Partnership or 10 days after the sale of the securities collateralizing the
 9 notes,” (see Greenstein Decl. Ex. 114 at IEC01238), rather than being made “in cash or by
 10 full recourse demand promissory notes,” as required by the Limited Partnership
 11 Agreements, (see Fund V LPA ¶ 4.3; Fund VI LPA ¶ 4.3). As discussed above, however, it
 12 is undisputed that most of the required notes were not prepared at all until I-Enterprise
 13 requested copies of the executed notes. Although the disclosures in the Financial
 14 Statements may have put I-Enterprise on notice that the General Partners had executed a
 15 different type of note than required, they did not put I-Enterprise on notice that, in the
 16 majority of instances, no note in fact was executed in any form.

17 Accordingly, the Court finds defendants have not shown as a matter of law that
 18 I-Enterprise’s negligent misrepresentation claims, to the extent such claims are based on
 19 misrepresentations about the General Partners’ execution of promissory notes, are time-
 20 barred.²³

21 **4. Business Judgment Rule**

22 Defendants argue that the business judgment rule exculpates them from liability for
 23 any misrepresentations, on the ground that the evidence establishes they acted “in

24
 25 ²² As a result of this ruling, the Court does not reach defendants’ additional argument
 26 that I-Enterprise waived any claim based on misrepresentation of investment objectives,
 27 and unduly delayed in bring a claim for rescission based on such asserted
 28 misrepresentations.

29 ²³ To the extent I-Enterprise may be asserting a claim based on the form, rather than
 30 the absence, of any note, such claim is time-barred.

1 accordance with their exercise of good faith business judgment and/or advice obtained
 2 from counsel and accountants regarding all of the conduct underlying I-Enterprise's
 3 negligence claims."²⁴ (See Fund V Motion at 17-18 (emphasis in original).)

4 Defendants note that the business judgment rule, as set forth in California
 5 Corporations Code § 309, precludes a corporate director from being held liable for acting
 6 "in good faith, in a manner such director believes to be in the best interests of the
 7 corporation and its shareholders and with such care, including reasonable inquiry, as an
 8 ordinarily prudent person in a like position would use under similar circumstances." See
 9 Cal. Corp. Code § 309. Defendants additionally note that a corporate director is entitled to
 10 rely on advice from counsel and independent accountants as long as "the director acts in
 11 good faith, after reasonable inquiry when the need therefor is indicated by the
 12 circumstances and without knowledge that would cause such reliance to be unwarranted."
 13 See id.

14 Defendants cite no case, however, in which the business judgment rule has been
 15 held to bar liability for negligent misrepresentation. Negligent misrepresentation is a form
 16 of fraud. See Cal. Civ. Code § 1710. The business judgment rule protects "well-meaning
 17 directors who are misinformed, misguided, and honestly mistaken." See Biren v. Equality
 18 Emergency Medical Group, Inc., 102 Cal. App. 4th 125, 137 (2002). The policy behind the
 19 business judgment rule would not be served by its application to the claims herein.
 20 Moreover, the business judgment rule applies only where the defendant has acted with
 21 "such care, including reasonable inquiry, as an ordinarily prudent person in a like position
 22 would use under similar circumstances," see Cal. Corp. Code § 309, whereas a requisite
 23 element of a claim of negligent misrepresentation is that the defendant made a statement
 24 "without reasonable ground for believing it to be true," see Hydro-Mill, 115 Cal. App. 4th at
 25 1154.

26 Accordingly, the Court finds the business judgment rule does not preclude liability for
 27

28 ²⁴ Contrary to defendants' assertion, I-Enterprise does not allege "negligence" claims, but rather alleges claims for negligent misrepresentation.

1 defendants' alleged misrepresentations.

2 **5. Investigation Clause in Fund VI Subscription Agreement**

3 Defendants argue they cannot be held liable for any misrepresentations in the Fund
 4 VI Offering Memorandum because, with respect to Fund VI only, I-Enterprise represented,
 5 in the Subscription Agreement for that fund, that it had investigated the accuracy of all
 6 statements in the Offering Memorandum and was satisfied that the information provided
 7 therein was clear and accurate. The Subscription Agreement for Fund VI, which was
 8 signed by Roy on July 26, 1999, provides, in relevant part:

9 The undersigned has consulted an attorney, accountant or other tax advisor
 10 with respect to this investment and it is understood that all documents,
 11 records and books pertaining to this investment have been made available for
 12 inspection to such attorney, accountant or advisor and the undersigned. The
 13 undersigned and the undersigned's attorney, accountant or advisor have had
 14 the opportunity to obtain any additional information requested necessary to
 15 verify the accuracy of the contents of the Memorandum, and to confer with a
 person authorized to act on behalf of the Partnership concerning the terms
 and conditions of the Memorandum and any additional information requested
 which was supplied to the undersigned or the undersigned's attorney,
 accountant or advisor, and all such questions have been answered to the full
 satisfaction of the undersigned, none of which answers is in any way
 inconsistent with the Memorandum and the attachments thereto.

16 (See Greenstein Decl. Ex. 81 (Fund VI Subscription Agreement) § 1(e).) Draper, Fisher,
 17 and Jurvetson all attest that although Roy visited the DFJ offices in June 1999, he did not
 18 ask them any questions about the content of the Fund VI Offering Memorandum. (See
 19 Draper Decl. ¶ 26; Fisher Decl. ¶ 24, Jurvetson Decl. ¶ 24.)

20 The Court agrees with I-Enterprise, however, that the above-quoted clause from the
 21 Subscription Agreement does not necessarily constitute a representation that all of the
 22 statements in the Offering Memorandum are correct, but, rather, is susceptible of the
 23 interpretation that I-Enterprise had the opportunity to obtain information about the
 24 statements in the Offering Memorandum and that it did not receive any information that was
 25 inconsistent with the statements therein. As discussed above, the Court cannot find, as a
 26 matter of law, that the documents available to I-Enterprise put it on notice as to any
 27 misrepresentations in the Offering Memoranda, other than those related to investment
 28 objectives. Accordingly, a trier of fact could conclude that I-Enterprise reasonably relied on

1 misrepresentations in the Offering Memoranda despite the language of the above-quoted
 2 clause in the Subscription Agreement. See, e.g., Salinas v. Souza & McCue Construction
 3 Co., 66 Cal. 2d 217, 224 (1967), overruled on other grounds, Helfend v. Southern California
 4 Rapid Transit District, 2 Cal. 3d 1, 14 (1970)) (finding contractor could reasonably rely on
 5 city's misrepresentations about soil conditions, despite contractual provision that contractor
 6 had "fully, thoroughly, and completely examined, inspected, and familiarized itself with all
 7 matters and things relating to said contract").

8 Accordingly, the Court finds the above-quoted clause in the Subscription Agreement
 9 does not bar I-Enterprise's negligent misrepresentation claims to the extent such claims are
 10 based on misrepresentations in the Fund VI Offering Memorandum.

11 **6. Damages/Rescission**

12 Defendants argue that I-Enterprise has no evidence of damages resulting from its
 13 claims for negligent misrepresentation. In response, I-Enterprise states it "is not seeking
 14 damages with respect to its negligent misrepresentation and fraud in the inducement for the
 15 diminution of its investment, but instead is seeking rescission and restitution because, had
 16 Defendants not made the misrepresentations, [I-Enterprise] never would have invested in
 17 the first place." (See Opp. at 55.) Defendants argue that I-Enterprise cannot seek
 18 rescission because, having sold stock distributed by the funds,²⁵ I-Enterprise is unable to
 19 restore everything of value it received under the contract. I-Enterprise fails to address this
 20 argument in its opposition.

21 Under California law, a party seeking rescission of a contract must give notice of
 22 rescission "promptly upon discovering the facts which entitle him to rescind" and "[r]estore
 23 to the other party everything of value which he has received from him under the contract or
 24 offer to restore the same upon condition that the other party do likewise, unless the latter is
 25 unable or positively refuses to do so." See Cal. Civ. Code § 1691. As noted, defendants

26
 27 ²⁵ Defendants submit evidence that Fund V has distributed approximately \$9.7
 28 million worth of stock to I-Enterprise and its predecessors, and that Fund VI has distributed
 approximately \$2.4 million worth of stock to its limited partners. (See Greenstein Decl.
 ¶¶ 93,161.)

1 contend I-Enterprise sold the stock that was distributed by the Funds, (see Fund VI Motion
 2 at 11; Fund V Reply at 13). The portions of the deposition cited in support thereof contain
 3 no such testimony, however. (See Wanger Decl. Ex. 33 (Blakey Dep.) at 73:19-74:12.) If
 4 defendants can prove I-Enterprise sold some of the stock distributed by the funds,
 5 I-Enterprise's claims for rescission would be barred, even if I-Enterprise offered to return
 6 the cash proceeds it received from the sale of the stock. See Dreiske v. Los Angeles Inv.
 7 Securities Corp., 13 Cal. App. 2d 59, 62 (1936) (quoting Bailey v. Fox, 78 Cal. 389 (1889))
 8 ("Upon a rescission the defendant, before paying back the purchase money and delivering
 9 up the notes, was entitled to receive the identical things sold. He was not bound to take the
 10 price at which they were sold. That might, so far as we know, have been less than their
 11 value."). Nevertheless, as defendants have cited no evidence that I-Enterprise sold any of
 12 the stock distributed by the funds, the Court finds defendants have not established, as a
 13 matter of law, that I-Enterprise is barred from seeking rescission by reason of its inability to
 14 restore to defendants everything of value received under the contract.

15 **C. Fraud Claim**

16 Defendants move for summary judgment on the fraud claim asserted against DFJ-VI
 17 and the individual defendants²⁶ for the same reasons set forth above with respect to the
 18 claims for negligent misrepresentation. As defendants, in their arguments, make no
 19 distinction between the negligent misrepresentation claims and fraud claim, the Court's
 20 rulings as set forth above apply equally to the fraud claim, except to the extent such claim
 21 is based on alleged omissions. To the extent defendants raise additional arguments solely
 22 with respect to the fraud claim, such arguments are addressed separately infra.

23 **1. Omissions**

24 As noted, a claim for negligent misrepresentation must be based on a "positive
 25 assertion." See Vegas v. Jones, Day, Reavis & Pogue, 121 Cal. App. 4th at 291 n.6. By
 26 contrast, a fraud claim, under certain circumstances, can be based on omissions,

28 ²⁶ No fraud claim is asserted against DFJ-V.

1 specifically, "(1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when
2 the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when
3 the defendant actively conceals a material fact from the plaintiff; and (4) when the
4 defendant makes partial representations but also suppresses some material facts." See
5 Limandri v. Judkins, 52 Cal. App. 4th 326 (1997). Accordingly, the Court will address
6 separately the merits of I-Enterprise's fraud claim to the extent it is based on nondisclosure
7 of material facts.

a. Failure to Disclose Diversion of Fund V Monies

9 As discussed above, I-Enterprise contends defendants engaged in fraud in the
10 marketing of Fund VI by not disclosing that they had diverted Fund V monies to purchase
11 shares of Wit Capital and Digital Impact for others, rather than investing the money for the
12 benefit of the Fund V limited partners. Specifically, I-Enterprise submits evidence that
13 \$375,000 of Fund V monies was used to purchase shares of Wit Capital in September
14 1998, and that in July 1999, approximately \$1.6 million in Fund V monies was used to
15 purchase shares of Digital Impact for Fund IV. (See Kent Decl. Ex. 56 at 10:19-22, 9:20-
16 25.) I-Enterprise further submits evidence that if the above-referenced Wit Capital shares
17 had been purchased for Fund V, that fund would have earned an additional \$3.9 to \$4.9
18 million by the beginning of 2000. (See Greenfield Decl. Ex. 14 (Fund V Q3 1999 Report) at
19 IEC0504 (showing Wit Capital stock purchased 9/11/98 increased in value from \$1.43 to
20 \$18.25 per share); see also id. Ex. 17 (Fund V Q1 2000 Report) at IEC0567 (showing Wit
21 Capital stock at \$17.125 per share); Ex. 15 (Fund V Q4 1999 Report) at IEC0513 (showing
22 Wit Capital stock at \$17.00 per share)).

23 Defendants state they treated the above-referenced monies as a loan, and repaid
24 the above-referenced “loans” with interest, (see Kent Decl. Ex. 56 at 10:19-22, 9:20-25),
25 and, consequently, nondisclosure of the loans was immaterial. In particular, defendants
26 point out, the \$375,000 used to purchase shares in Wit Capital was repaid to Fund V after
27 approximately one month, on October 14, 1998, and \$2,113.65 in interest was paid on
28 November 23, 2004. (See *id.* at 10:23-24.) The \$1.6 million used to purchase shares of

1 Digital Impact was repaid in approximately two months, and \$16,468 in interest was paid on
2 July 20, 2004. (See id. at 9:20-25.) Defendants argue nondisclosure of the loans was
3 immaterial because the loans were repaid promptly. Additionally, Greenstein attests that
4 "in [his] experience as an accountant and auditor, loans such as the type made by Fund V
5 which are repaid by the end of the reporting year are typically considered immaterial and
6 need not be reported in the annual audited reports." (See Greenstein Decl. ¶ 163.)

7 At least with respect to the Wit Capital investment, however, I-Enterprise has
8 submitted evidence that Fund V, as of the beginning of 2000, was deprived of
9 approximately \$3.9 to \$4.9 million in profits on those shares. Moreover, a reasonable trier
10 of fact could find that an investor would deem it material that fund assets were being used
11 to purchase stock for others at the fund's expense, even if that money was later repaid.
12 Any money used to purchase assets for others is money that is not available for the fund to
13 invest on behalf of its own partners.

14 Accordingly, defendants are not entitled to summary judgment on the ground the
15 nondisclosure of “interfund loans” was immaterial.

b. Failure to Disclose Misappropriation of “Compensation and Benefits” Belonging to Fund V

As discussed above, I-Enterprise has submitted evidence that when Netzero offered 25,000 directed shares to Fonstad, she made those shares available to others, rather than using the value of those shares to reduce the amount of management fees paid by Fund V to the General Partner, as assertedly is required by the section 6.1(d) of the Fund V LPA.

Defendants argue that, within the meaning of § 6.1(d), the offer of directed shares cannot be considered “compensation” and thus need not be used to offset management fees. In that regard, defendants attest that “directed shares are not compensation; directed shares are the opportunity to purchase shares of a company for cash at the IPO price[.]” (See Draper Decl. ¶ 72; Fisher Decl. ¶ 70; Jurvetson Decl. ¶ 69.) The Court cannot say as a matter of law, however, that such an opportunity has no value and cannot be considered compensation. Cf. In re Marriage of Cheriton, 92 Cal. App. 4th 269, 286 (2001)

1 (considering stock options part of parent's compensation for purposes of calculating child
2 support).

3 Defendants further argue, however, that, at worst, the decision to retain the Netzero
4 directed shares, and the nondisclosure thereof, were honest mistakes, rather than fraud.
5 The Court agrees. There is no evidence that defendants were aware of Netzero's offer to
6 Fonstad, let alone that they deliberately decided not to disclose Fonstad's failure to use the
7 Netzero directed shares to reduce Fund V management fees. In short, there is no
8 evidence from which a reasonable trier of fact could conclude that defendants acted with
9 intent to defraud when, in marketing Fund VI, they failed to disclose the above-referenced
10 transaction.

11 Accordingly, summary judgment for defendants will be granted on I-Enterprise's
12 fraud claim, to the extent such claim is based on a failure to disclose Fonstad's retention of
13 directed shares.

14 **2. Other Arguments**

15 In addition to the arguments addressed above, defendants set forth two arguments,
16 discussed below, as to their entitlement to summary judgment with respect to certain of the
17 fraud claims.

18 **a. Capital Calls**

19 The elements of fraud include an "intent to defraud, i.e., to induce reliance." See
20 Lazar v. Superior Court, 12 Cal. 4th 631, 638 (1996). Defendants argue that I-Enterprise
21 cannot show that defendants intended not to make their required capital contributions.
22 Consequently, defendants argue, they are entitled to summary judgment on I-Enterprise's
23 fraud claim, to the extent such claim is based on defendants' failure to provide promissory
24 notes for their capital contributions.

25 Greenstein attests that, on or about December 31, 1999, DFJ-VI executed a
26 promissory note in the amount of \$568,182, representing DFJ-VI's total capital contribution
27 owed to that date. (See Greenstein Decl. ¶ 151.) Greenstein acknowledges the note was
28 in the wrong form, as it was not the full recourse promissory note required by the Fund VI

1 Limited Partnership Agreement. (See id. ¶ 153.) According to Greenstein, DFJ-VI then
 2 failed, due to an oversight, to execute promissory notes for approximately eighteen capital
 3 contributions between January 2000 and 2003. (See id. ¶ 154.) Although it failed to
 4 execute promissory notes, it consistently acknowledged its capital contribution obligations
 5 in the fund's financial statements. (See id. Exs. 114-117.) According to Greenstein, when
 6 DFJ-VI realized it had neglected to execute promissory notes for the majority of its capital
 7 contributions, and that its December 31, 1999 note was in the wrong form, it executed, in
 8 January 2003, demand full recourse promissory notes for all capital contributions owed as
 9 of that date. (See id. ¶ 155; see also id. Ex. 119 (promissory notes)). Greenstein attests
 10 that, "at all times, [DFJ-VI] has intended to make all capital contributions required of it under
 11 the Fund VI Limited Partnership Agreement." (See Greenstein Decl. ¶ 155.) Likewise,
 12 Draper, Fisher, and Jurvetson all attest that, prior to January 2003, they were unaware that
 13 the requisite promissory notes had not been executed, and that the one note that was
 14 executed was in the wrong form. (See Draper Decl. ¶ 84; Fisher Decl. ¶ 82; Jurvetson
 15 Decl. ¶ 81.)

16 Additionally, defendants submit evidence that at the same time they were alleged to
 17 have been defrauding I-Enterprise by failing to execute promissory notes for their capital
 18 contributions to Fund VI, they were investing substantial sums of their own money, and that
 19 of their family and friends, in a Fund VI "side-by-side fund," which "invested cash in
 20 lockstep with, and on the same terms as, the main funds." (See Draper Decl. ¶¶ 68-71;
 21 Fisher Decl. ¶¶ 66-69; Jurvetson Decl. ¶¶ 65-68; Greenstein Decl. ¶¶ 158-160.)

22 As discussed above, in connection with the negligent misrepresentation claims,
 23 however, I-Enterprise has submitted evidence that Greenstein was aware since 1999 that
 24 most of the promissory notes had not been executed, and that when I-Enterprise requested
 25 copies of the notes, he did not tell I-Enterprise that no executed notes existed, but, rather
 26 had a note created to send to I-Enterprise. Under such circumstances, I-Enterprise has
 27 raised a triable issue of material fact as to whether defendants acted with intent to defraud
 28 when they represented that the General Partners had executed promissory notes to secure

1 their capital contributions.

2 Accordingly, defendants' motion for summary judgment will be denied as to the fraud
 3 claim, to the extent such claim is based on defendants' misrepresentation that the General
 4 Partners had executed promissory notes to secure their capital contributions.

5 **b. Allocation of Profit and Loss**

6 I-Enterprise alleges that DFJ-VI and the individual defendants represented in the
 7 Fund VI Offering Memorandum and Limited Partnership Agreement that they would
 8 "determine and allocate profits and losses in a specified manner," and that such
 9 representations "were false and misleading in that they failed to disclose that at the time
 10 [those] representations were made, [DFJ-VI] was in breach of parallel provisions with
 11 respect to Fund V." (See 4AC ¶ 222.) Defendants argue that I-Enterprise cannot show
 12 any such misrepresentations were made, because defendants allocated profits and losses
 13 exactly as set forth in the Fund VI Limited Partnership Agreement. In response,
 14 I-Enterprise submits no evidence that defendants failed to allocate profits and losses in the
 15 manner set forth in the Fund VI Offering Memorandum and Limited Partnership Agreement,
 16 and, indeed, fails to address the claim at all.

17 Accordingly, I-Enterprise has failed to raise a triable issue of material fact as to
 18 whether defendants fraudulently misrepresented the method by which profits and losses
 19 would be allocated with respect to Fund VI, and defendants' motion for summary judgment
 20 will be granted on I-Enterprise's fraud claim, to the extent such claim is based on such
 21 allegations.

22

23 **D. Claim for Violation of Massachusetts Blue Sky Law**

24 I-Enterprise's claim for violation of the Massachusetts Blue Sky Law,²⁷ asserted

25

26 ²⁷ Under the Massachusetts Uniform Securities Act, to which I-Enterprise refers as
 27 the "Massachusetts Blue Sky law," any person who "offers or sells a security by means of
 28 any untrue statement of material fact or any omission to state a material fact necessary in
 order to make the statements made, in the light of the circumstances under which they are
 made, not misleading . . . is liable to the person buying the security from him, who may sue
 either at law or in equity to recover the consideration paid for the security, together with

1 against DFJ-VI and the individual defendants only, is based on the same alleged
 2 misrepresentations that form the basis of its claim against said defendants for negligent
 3 misrepresentation. Accordingly, the Court's rulings above, with respect to the negligent
 4 misrepresentation claim, apply equally to I-Enterprise's claim for violation of the
 5 Massachusetts Blue Sky Law, with the exception of the Court's ruling on the issue of
 6 whether such claim is time-barred.²⁸

7 The Court next addresses defendants' additional arguments respecting only the
 8 Massachusetts Blue Sky Law.

9 1. Choice of Law Provision

10 Defendants argue I-Enterprise cannot prevail on its claim against DFJ-VI and the
 11 individual defendants for violation of the Massachusetts Blue Sky Law because the parties
 12 agreed in both the Fund VI Subscription Agreement and the Fund VI Limited Partnership
 13 Agreement that California law would govern. See Greenstein Decl. Ex. 81 (Fund VI
 14 Subscription Agreement) ("This Subscription shall be enforced, governed and construed in
 15 all respects in accordance with the laws of the State of California."); Fund VI LPA § 15.1
 16 ("This Agreement shall be governed by and construed under the laws of the State of
 17 California as applied to agreements among the residents of such state made and to be
 18 performed entirely within such state."). Defendants previously moved to dismiss this claim
 19 on the same ground, and the Court denied the motion, noting that the Fund VI Subscription
 20 Agreement expressly provided: "Notwithstanding any of the representations, warranties,
 21 acknowledgments or agreements made hereby by the undersigned, the undersigned does
 22 not hereby or in any other manner waive any rights granted to him or her under federal or
 23 state securities laws." (See July 2005 Order at 12.) The Court noted that "[r]ead together,
 24 the two sections are susceptible of an interpretation under which California law generally

25
 26 interest at six per cent per year from the date of payment, costs, and reasonable attorneys'
 27 fees, less the amount of any income received on the security, upon the tender of the
 28 security." See Mass. Gen. Laws, ch. 110A, § 410(a)(2).

²⁸ The statutes of limitations for negligent misrepresentation and violation of the Massachusetts Blue Sky law are different, as set forth below.

1 governs, but investors in Fund VI are not precluded from bringing suit to enforce their rights
 2 under any applicable federal or state securities law." (See *id.*)²⁹

3 Defendants now argue that the California choice of law provision in the Subscription
 4 Agreement and Limited Partnership Agreement trumps the more general anti-waiver
 5 provision in the Subscription Agreement. None of the cases cited by defendants involves
 6 the instant situation, however, where a choice of law clause and a clause expressly
 7 declining to waive rights granted under the federal and state securities laws appear in the
 8 same agreement. Accordingly, the Court declines to revisit its earlier ruling, and finds
 9 defendants are not entitled to summary judgment on the Massachusetts Blue Sky Law
 10 claim on the ground such claim is barred by the choice of law provision in the Subscription
 11 Agreement and Limited Partnership Agreement.

12 **2. Public Policy**

13 Defendants further argue they are entitled to summary judgment on I-Enterprise's
 14 claim for violation of the Massachusetts Blue Sky Law because application of
 15 Massachusetts law would violate California public policy. Specifically, defendants argue
 16 that I-Enterprise's claim would be time-barred if brought under California law. Defendants
 17 raised this argument previously in a motion to dismiss. In ruling on that motion, the Court,
 18 while recognizing that "California's interest in applying its own law is strongest when its
 19 statute of limitations is shorter than that of the foreign state, because a state has a
 20 substantial interest in preventing the prosecution in its courts of claims which it deems to be
 21 stale," nonetheless denied the motion to dismiss because defendants had made no
 22 showing that I-Enterprise's claim for violation of the Massachusetts Blue Sky Law would be
 23 time-barred if brought under California law. (See July 15 Order at 13 (quoting *Deutsch v.*
 24 *Turner Corp.*, 324 F.3d 692, 717 (9th Cir. 2003)). Defendants now argue the evidence
 25 demonstrates that I-Enterprise's claim would be time-barred if brought under California law.

26 As the Court noted in ruling on the motion to dismiss, the California Securities Act

27
 28 ²⁹ The Court further noted that both the California and Massachusetts Blue Sky Laws
 contain an anti-waiver provision. (See *id.* n.5.)

1 has a shorter statute of limitations than the four-year period set forth under the
 2 Massachusetts Blue Sky law. Compare Cal. Corp. Code § 25506 (providing that “no action
 3 shall be maintained . . . unless brought before the expiration of four years after the act or
 4 transaction constituting the violation or the expiration of one year after the discovery by the
 5 plaintiff of the facts constituting the violation, whichever shall first expire”) with Mass. Gen.
 6 Laws, ch. 110A, § 410(e) (providing that “[n]o person may sue . . . more than four years
 7 after the discovery by the person bringing the action of a violation”). The complaint in the
 8 instant action was filed April 11, 2003,³⁰ and I-Enterprise’s claims were filed July 23, 2003,
 9 both of which dates are within four years of the dates Roy entered into the Fund VI
 10 Subscription Agreement and Limited Partnership Agreement. (See Fund VI Subscription
 11 Agreement, entered into July 31, 1999, and Fund VI LPA, entered into August 13, 1999.)
 12 The remaining issue is whether the complaint was filed within “one year after the discovery
 13 by the plaintiff of the facts constituting the violation.” See Cal. Corp. Code § 25506. The
 14 California Court of Appeal has held identical language in another provision of the California
 15 Securities Act to require “actual knowledge, not just ‘inquiry notice.’” See Eisenbaum, 218
 16 Cal. App. 3d at 325 (interpreting Cal. Corp. Code § 25507). Accordingly, I-Enterprise’s
 17 claim is not time-barred under California law unless it had actual knowledge of the asserted
 18 violations of the Massachusetts Blue Sky Law more than one year before the complaint
 19 was filed.

20 As noted, the allegations in support of I-Enterprise’s claim for violation of the
 21 Massachusetts Blue Sky Law are identical to those alleged in support of its claims for
 22 negligent misrepresentation. Although the statute of limitations for the negligent
 23 misrepresentation claims is longer than the one-year discovery provision of § 25506,
 24 defendants’ arguments as to why the negligent misrepresentation and Massachusetts Blue
 25 Sky Law claims are time-barred are, essentially, identical. Because, as discussed earlier,
 26 I-Enterprise was on notice as to the alleged misrepresentations concerning investment
 27

28 ³⁰ As noted, the initial complaint was for declaratory relief and filed by defendants.

1 objectives more than three years before the instant action was filed, I-Enterprise
 2 necessarily was on notice as to those misrepresentations more than one year before the
 3 action was filed. Consequently, the Court's rulings as set forth above with respect to the
 4 timeliness of the negligent misrepresentation claims are equally applicable to the claim for
 5 violation of the Massachusetts Blue Sky Law.

6 Accordingly, defendants have demonstrated that the Massachusetts Blue Sky Law
 7 claim, to the extent it is based on misrepresentations of investment objectives, would be
 8 time-barred if brought under California law, and, consequently, defendants are entitled to
 9 summary judgment on said claim, to the extent it is based on misrepresentations of
 10 investment objectives, because application of Massachusetts law would violate California
 11 public policy. See Deutsch, 324 F.3d at 717. As defendants have not demonstrated that
 12 the remainder of the Massachusetts Blue Sky claim is time-barred, however, defendants
 13 are not entitled to summary judgment on that claim in its entirety.

14 **E. Claim for Violation of California Blue Sky Law**

15 I-Enterprise's claim for violation of the California Blue Sky Law,³¹ asserted against
 16 DFJ-VI and the individual defendants only, is based on the same alleged
 17 misrepresentations that form the basis of its claim against said defendants for negligent
 18 misrepresentation. Accordingly, the Court's rulings above, with respect to the negligent
 19 misrepresentation claim, apply equally to I-Enterprise's claim for violation of the California
 20 Blue Sky Law.

21 ³¹ I-Enterprise's claim for violation of the California Blue Sky Law is based on
 22 §§ 25401 and 25501 of the California Corporations Code. Section 25401 provides: "It is
 23 unlawful for any person to offer to sell a security in this state or buy or offer to buy a
 24 security in this state by means of any written or oral communication which includes an
 25 untrue statement of material fact or omits to state a material fact necessary in order to
 26 make the statements made, in light of the circumstances under which they were made, not
 27 misleading." See Cal. Corp. Code § 25401. Section 25501 provides, in relevant part, "Any
 28 person who violates Section 25401 shall be liable to the person who purchases a security
 from him or sells a security to him, who may sue either for rescission or for damages (if the
 plaintiff or the defendant, as the case may be, no longer owns the security), unless the
 defendant proves that the plaintiff knew the facts concerning the untruth or omission or that
 the defendant exercised reasonable care and did not know (or if he had exercised
 reasonable care would not have known) of the untruth or omission." See Cal. Corp. Code §
 25501.

1 The Court next addresses defendants' additional arguments respecting the
 2 California Blue Sky Law.

3 **1. Timeliness**

4 Defendants move for summary judgment on I-Enterprise's claim for violation of the
 5 California Blue Sky Law on the ground that such claim is time-barred. Because the Court's
 6 ruling as to the timeliness of the negligent misrepresentation claims is equally applicable to
 7 I-Enterprise's claim for violation of the California Blue Sky Law, defendants have
 8 demonstrated that the California Blue Sky Law claim, to the extent such claim is based on
 9 misrepresentations as to investment objectives, is time-barred. Accordingly, defendants
 10 are entitled to summary judgment thereon. Because defendants have not demonstrated
 11 that the remainder of the California Blue Sky claim is time-barred, however, defendants are
 12 not entitled to summary judgment on such claim in its entirety.

13 **2. Intent**

14 Defendants also argue they are entitled to summary judgment on the California Blue
 15 Sky Law claim on the ground I-Enterprise cannot show defendants acted with the requisite
 16 intent.

17 I-Enterprise alleges that defendants violated California Corporations Code §§ 25401
 18 and 25501 by selling an interest in Fund VI "by means of one or more untrue statements of
 19 material fact or one or more omissions to state material facts necessary to make the
 20 statements made, in light of the circumstances under which they are made, not
 21 misleading[.]" (See 4 AC ¶ 292.) As I-Enterprise correctly notes, §§ 25401 and 25501
 22 make no reference to intent, and the cases upon which defendants rely address claims
 23 brought under different statutes, §§ 25400 and 25500, which expressly require,
 24 respectively, an unlawful "purpose" and a showing of "willfullness." See Cal. Corp. Code
 25 §§ 25400, 25500. By contrast, a civil claim for violation of §§ 25401 and 25501 does not
 26 require a showing of intent. See California Amplifier, Inc. v. RLI Ins. Co., 94 Cal. App. 4th
 27 102, 109 (2002) (noting "section 25500 is limited to intentional misrepresentations" while
 28 § 25501 "extend[s] liability to some negligent conduct"); see also People v. Simon, 9 Cal.

1 4th 493, 516 (1995) (noting civil claim for violation of §§ 25401 and 25501 requires proof
 2 that “the seller was aware or was negligent in failing to be aware that his representations
 3 were misleading”) (emphasis added).

4 Accordingly, as I-Enterprise’s claim for violation of §§ 25401 and 25501 does not
 5 require proof of intent, defendants are not entitled to summary judgment on that claim on
 6 the ground I-Enterprise cannot prove defendants made intentional misrepresentations.

7 **F. Contract Claims Against Individual Defendants**

8 The individual defendants argue that all contract claims asserted against them must
 9 be dismissed because they are not parties to the Fund V or Fund VI LPAs. Each of the
 10 individual defendants attests that he was not a party to the Fund V or Fund VI LPA in his
 11 individual capacity, and that his only involvement with the LPAs was in his capacity as a
 12 Managing Member of DFJ-V and DFJ-VI. (See Draper Decl. ¶¶ 20, 35; Fisher Decl. ¶¶ 18,
 13 33; Jurvetson Decl. ¶¶ 18, 33.) I-Enterprise, in its opposition, makes no argument and cites
 14 no evidence suggesting that the individual defendants are parties to the LPAs, or that they
 15 otherwise can be held liable for breaching any provision of those agreements.

16 Accordingly, summary judgment for defendants will be granted on all claims for
 17 breach of contract and breach of the covenant of good faith and fair dealing asserted
 18 against the individual defendants.

19 **G. Contract Claims Against DFJ-V and DFJ-VI**

20 Although the Court previously dismissed many of I-Enterprise’s claims for breach of
 21 contract and breach of the covenant of good faith and fair dealing as improperly asserted
 22 derivative claims, the Court also found that, to the extent the contract claims were based on
 23 an asserted failure to distribute marketable securities and failure to disclose “Detrimental
 24 Acts,” such claims were not derivative claims and thus not subject to dismissal. (See Order
 25 Granting in Part and Denying in Part Counterdefendants’ Motion for Judgment on the
 26 Pleadings, filed December 15, 2004, (“December 2004 Order”) at 15-16; see also July 2005
 27 Order at 7-8.) Defendants now move for summary judgment on all remaining contract
 28 claims, as asserted against DFJ-V and DFJ-VI.

1. Failure to Distribute Marketable Securities

2 The LPAs provide that the General Partners may, at their discretion, distribute
3 marketable securities to the limited partners, under certain circumstances. (See Greenberg
4 Decl. Ex. 4 (Fund V LPA) § 7.5; see also id. Ex. 87 (Fund VI LPA) § 7.5.) I-Enterprise
5 alleges that DFJ-V breached the LPA by failing to distribute shares of Wit Capital, Netzero,
6 and Ciena in a timely manner. (See 4AC ¶ 128.) I-Enterprise alleges that DFJ-VI breached
7 the LPA by failing to distribute shares of United Online, Extended Systems, and Keynote
8 Systems in a timely manner. (See id. ¶ 130.) Defendants move for summary judgment on
9 I-Enterprise's contract claims to the extent such claims are based on an alleged failure to
10 distribute marketable securities, on the ground I-Enterprise has no evidence showing
11 defendants abused their discretion in determining when to distribute marketable securities.
12 As defendants point out, defendants have submitted declarations attesting to the reasons
13 they did or did not distribute the above-referenced securities, (see Draper Decl. ¶¶ 76-82;
14 Fisher Decl. ¶¶ 74-80; Jurvetson Decl. ¶¶ 73-79), and I-Enterprise, in response, has made
15 no argument nor cited to any evidence suggesting that defendants abused their discretion
16 under the LPAs in determining when or whether to distribute any of the above-referenced
17 securities.

18 Accordingly, summary judgment for defendants will be granted on the claims for
19 breach of contract and breach of the covenant of good faith and fair dealing asserted
20 against DFJ-V and DFJ-VI, to the extent such claims are based on an alleged failure to
21 distribute marketable securities in a timely manner.

2. Failure to Disclose Detrimental Acts

23 The LPAs for Fund V and Fund VI require that the General Partner give written
24 notice to the limited partners if the General Partner or any of its managing members has
25 committed a “Detrimental Act.”³² (See Greenberg Decl. Ex. 4 (Fund V LPA) § 14.9; see

³² The LPAs define “Detrimental Act” as “(i) actual fraud or willful misconduct which directly causes a material adverse effect to the Partnership or its assets or (ii) being convicted of a felony or of securities fraud or embezzlement.” (See Greenberg Decl. Ex. 4 (Fund V LPA) § 8.4; see also id. Ex. 87 (Fund VI LPA) § 8.4.)

1 also id. Ex. 87 (Fund VI LPA) § 14.9.) Each LPA further provides that the Fund may be
 2 terminated if, within 90 days of receipt of such notice, two-thirds of the limited partners vote
 3 to terminate the Fund. (See id.) Defendants, relying on several grounds, move for
 4 summary judgment on all of I-Enterprise's contract claims to the extent such claims are
 5 based on a failure to disclose Detrimental Acts.

6 Defendants' first argument is that I-Enterprise cannot prevail on these claims
 7 because it has not pursued what defendants contend are the only "direct remedies"
 8 available to it, specifically, a vote of the limited partners to terminate the Funds, or judicial
 9 dissolution of the Funds.³³ I-Enterprise responds that it suffered injury and damages as a
 10 result of defendants' alleged failure to provide notice of Detrimental Acts because, had it
 11 received such notice, it would not have invested in Fund VI, would have sought dissolution
 12 of the partnerships or to replace the General Partner, and would not have been required to
 13 make capital calls. I-Enterprise argues that by the time it learned of the extent of
 14 defendants' failure to disclose Detrimental Acts, I-Enterprise had already made most of its
 15 capital contributions and this litigation existed, by which I-Enterprise's rights could be
 16 vindicated. Consequently, I-Enterprise argues, there was no reason to file a duplicative
 17 state court action for dissolution of the Funds.

18 The Court agrees with I-Enterprise that if I-Enterprise were able to demonstrate
 19 defendants failed to disclose Detrimental Acts, and that, had I-Enterprise known of such
 20 acts at the time they were committed, it would not have invested in Fund VI or would have
 21 sought dissolution of the Funds, I-Enterprise conceivably would be able to show it suffered
 22 damages as a result of defendants' failure to give such notice. I-Enterprise, however, has
 23 submitted no evidence that it would have taken such action had it known of defendants'

24

25 ³³ Defendants previously moved to dismiss I-Enterprise's contract claims for failure
 26 to disclose Detrimental Acts, on the ground that I-Enterprise could not show that it suffered
 27 any injury; the Court denied that motion because the gravamen of I-Enterprise's claims was
 28 that defendants' failure to provide notice of Detrimental Acts precluded I-Enterprise from
 taking action to protect its investment in the funds, and that defendants had not shown, as
 a matter of law, there was no action I-Enterprise could have taken to protect its investment
 had it received notice of defendants' alleged wrongdoing. (See July 2005 Order at 8-9.)

1 failure to disclose Detrimental Acts at the time such acts were committed. Although
 2 I-Enterprise, in its opposition, asserts that it would have avoided investing in Fund VI had it
 3 learned of acts of misconduct that occurred prior to August 1999, and that, as to acts of
 4 misconduct occurring thereafter, it would have attempted to seek dissolution of the Funds
 5 or removal of the General Partners, no such statement appears in the declaration cited in
 6 support thereof. (See Opp. at 28:9-14 (citing Roy Decl. ¶¶ 6, 8, 11).)³⁴

7 Accordingly, I-Enterprise has not established a triable issue of material fact exists as
 8 to whether it was damaged by defendants' alleged failure to disclose Detrimental Acts, and
 9 summary judgment for defendants will be granted on I-Enterprise's claims for breach of
 10 contract and breach of the covenant of good faith and fair dealing, to the extent such claims
 11 are based on such alleged nondisclosure.³⁵

12 **3. Investment in DFJ Affiliate in Violation of Fund VI LPA**

13 I-Enterprise contends defendants violated the Fund VI LPA by investing in Amazing
 14 Media, which I-Enterprise contends was a Fund VI affiliate, without obtaining prior consent
 15 to the transaction from the limited partners. I-Enterprise fails, however, to cite to any
 16 provision of the Fund VI LPA requiring prior consent of the limited partners to any such
 17 transaction. Moreover, I-Enterprise fails to cite to any evidence suggesting that Amazing
 18 Media was an "affiliate" of Fund VI within the meaning of the Fund VI LPA. (See
 19 Greenstein Decl. Ex. 87 (Fund VI LPA) ¶ 14.3 ("An Affiliate of any person shall mean any
 20 person that directly, or indirectly through one or more intermediaries, controls, or is
 21 controlled by or is under common control with the person specified.").

22 Accordingly, summary judgment for defendants will be granted on I-Enterprise's
 23

24 ³⁴ Although Roy attests that if defendants had disclosed that they were
 25 contemplating devoting less time and energy to Fund VI, he would not have invested (see
 26 Roy Decl. ¶ 6), the Court previously has dismissed all claims based either on defendants'
 27 alleged failure to devote an objectively adequate amount of time to management of the
 Funds or on alleged misrepresentations about the amount of time defendants would devote
 to the management of the Funds. (See November 2005 Order at 9-10.)

28 ³⁵ As a result of this ruling, the Court does not reach the parties' arguments as to
 whether defendants in fact committed any Detrimental Acts and failed to disclose them.

1 claims for breach of contract and breach of the covenant of good faith and fair dealing, to
2 the extent such claims are based on Fund VI's investment in Amazing Media.

3 **H. Breach of Fiduciary Duty Claims**

4 Defendants do not offer a separate argument as to why summary judgment should
5 be granted for defendants on I-Enterprise's claims for breach of fiduciary duty; rather,
6 defendants argue they are entitled to summary judgment on those claims for the same
7 reasons they are entitled to summary judgment on I-Enterprise's claims for breach of
8 contract and breach of the covenant of good faith and fair dealing. In response,
9 I-Enterprise argues that defendants are liable for breaching their fiduciary duties to
10 I-Enterprise, regardless of whether they are liable for breach of contract or breach of the
11 covenant of good faith and fair dealing.

12 The Court previously has dismissed I-Enterprise's claims for breach of fiduciary duty,
13 on the ground they are improperly asserted derivative claims, except to the extent they are
14 based on an alleged failure to distribute marketable securities and failure to disclose
15 Detrimental Acts. (See December 2004 order at 3-4, 19-20; see also July 2005 order at 2-
16 3, 5-9.) With respect to the former, any duty to distribute marketable securities to
17 I-Enterprise derives entirely from the LPAs, (See Fund V LPA § 7.5; Fund VI LPA § 7.5),
18 and as discussed above, I-Enterprise has submitted no evidence that defendants abused
19 their discretion under the LPAs in determining whether or when to distribute any securities.
20 Accordingly, for the same reasons summary judgment will be granted for defendants on
21 I-Enterprise's contract claims, summary judgment also will be granted for defendants on
22 I-Enterprise's claim for breach of fiduciary duty, to the extent such claim is based on a
23 failure to distribute marketable securities.

24 With respect to the alleged failure to disclose Detrimental Acts, although defendants
25 have a contractual duty, based on the language of the Limited Partnership Agreements, to
26 disclose Detrimental Acts, they also have an independent fiduciary duty of disclosure to the
27 limited partners. See, e.g., McCain v. Phoenix Resources, Inc., 185 Cal. App. 3d at 579
28 ("Partners have a duty to make a full and fair disclosure of all matters substantially affecting

1 the value of the partnership.”). As discussed in the Court’s prior orders, however, any claim
2 for breach of the fiduciary duty of disclosure is a derivative claim that cannot be asserted in
3 the instant lawsuit, unless the asserted breach caused I-Enterprise to suffer an injury that is
4 not incidental to the injury suffered by the entire partnership. (See December 2004 Order
5 at 5-6, 9-12; July 2005 Order at 5-9.) At that time, the Court held I-Enterprise’s claims for
6 breach of the fiduciary duty of disclosure were not subject to dismissal as derivative claims
7 because I-Enterprise had alleged that defendants’ failure to provide notice of their
8 wrongdoing prevented I-Enterprise, individually, from taking action to protect its investment.
9 (See July 15 Order at 5-9.)³⁶ At this stage of the proceedings, however, I-Enterprise was
10 required to submit, but has not submitted, evidence in support of the allegation.

11 Accordingly, summary judgment for defendants will be granted on I-Enterprise's
12 claims for breach of fiduciary duty.

I. Accounting

14 Defendants move for summary judgment on I-Enterprise’s claim for an accounting,
15 on the ground I-Enterprise has failed to establish the requisite fraud necessary to support
16 an accounting claim. I-Enterprise alleges a claim for an accounting on the basis of DFJ-V’s
17 alleged breach of its fiduciary duty to I-Enterprise, and because the partnership accounts
18 are complicated. (See 4AC ¶¶ 215-219, 283-287.) Breach of fiduciary duty, complicated
19 accounts, and fraud are all “proper grounds for an accounting.” See Union Bank v.
20 Superior Court, 31 Cal. App. 4th 573, 593 (1995). The existence of complicated accounts
21 does not entitle a plaintiff to an accounting, however, where the defendants have engaged
22 in no misconduct, no money is owed, and no property must be returned. See *id.*

23 As discussed above, defendants are entitled to summary judgment on I-Enterprise's
24 claim for breach of fiduciary duty, but have not established they are entitled to summary
25 judgment with respect to the entirety of I-Enterprise's fraud claim. Consequently, they have

³⁶ In particular, the Court noted that, under the LPAs, I-Enterprise could have sought termination of the partnership through a vote of the limited partners, or could have sought judicial dissolution. (See *id.* at 8-9.)

1 not demonstrated their entitlement to summary judgment on the accounting claim.

2 **J. Unjust Enrichment**

3 Defendants move for summary judgment on I-Enterprise's claims for unjust
4 enrichment, on the same ground they moved to dismiss said claim. Specifically,
5 defendants contend the unjust enrichment claim is an improperly pleaded derivative claim.
6 The Court, however, denied defendants' motion to dismiss the unjust enrichment claim,
7 (see November 2005 Order at 3-4), and defendants set forth no additional ground to
8 support judgment in their favor at this time. Accordingly, defendants' motion for summary
9 judgment on I-Enterprise's claim for unjust enrichment will be denied.

10 **K. Punitive Damages**

11 Defendants argue they are entitled to summary judgment on I-Enterprise's claims for
12 punitive damages. I-Enterprise seeks punitive damages only with respect to its claims for
13 fraud and breach of fiduciary duty. (See 4AC ¶¶ 202, 228, 275.) Under California law, a
14 plaintiff is entitled to punitive damages "where it is proven by clear and convincing evidence
15 that the defendant has been guilty of oppression, fraud, or malice." See Cal. Civ. Code
16 § 3294. Although the Court has found defendants are entitled to summary judgment on
17 I-Enterprise's claims for breach of fiduciary duty, it has not granted the motion for summary
18 judgment with respect to the entirety of the fraud claim. Accordingly, defendants are not
19 entitled to summary judgment on the issue of punitive damages.

20 **CONCLUSION**

21 For the reasons set forth above, defendants' motions for summary judgment are
22 hereby GRANTED IN PART and DENIED IN PART, as follows:

23 1. Defendants' motions for summary judgment are GRANTED on I-Enterprise's
24 claims for negligent misrepresentation, violation of the Massachusetts Blue Sky Law, and
25 violation of the California Blue Sky Law, except to the extent such claims are based on the
26 following allegations, as to which claims the motions are DENIED: (1) the Fund V and
27 Fund VI Offering Memoranda misrepresented that Draper was a "start-up investor" in
28 Parametric and that Draper "made more than 500 times his money on the original

1 investment"; (2) the Fund VI Offering Memorandum misrepresented that Fund III's
2 \$300,000 initial investment in Hotmail was worth 350 times that amount by June 30, 1999;
3 (3) the Fund V and Fund VI Offering Memoranda misrepresented that DFJ was a "seed
4 investor" in Preview Travel and an investor of the "1st Professional Round" of Preview
5 Travel; and (4) the Fund V and Fund VI Financial Statements misrepresented that the
6 General Partners had executed promissory notes to secure their capital contributions.

7 2. Defendants' motions for summary judgment are GRANTED on I-Enterprise's
8 fraud claim, except to the extent such claims are based on the following allegations, as to
9 which claims the motions are DENIED: (1) the Fund V and Fund VI Offering Memoranda
10 misrepresented that Draper was a "start-up investor" in Parametric and that Draper "made
11 more than 500 times his money on the original investment"; (2) the Fund VI Offering
12 Memorandum misrepresented that Fund III's \$300,000 initial investment in Hotmail was
13 worth 350 times that amount by June 30, 1999; (3) the Fund V and Fund VI Offering
14 Memoranda misrepresented that DFJ was a "seed investor" in Preview Travel and an
15 investor of the "1st Professional Round" of Preview Travel; (4) the Fund V and Fund VI
16 Financial Statements misrepresented that the General Partners had executed promissory
17 notes to secure their capital contributions; and (5) defendants failed to disclose that Fund V
18 monies had been diverted to purchase securities for others, rather than for the benefit of
19 Fund V's limited partners.

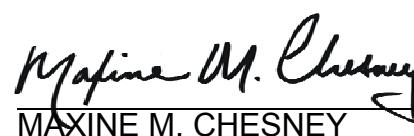
20 3. Defendants' motions for summary judgment on I-Enterprise's claims for breach of
21 contract, breach of the covenant of good faith and fair dealing, and breach of fiduciary duty
22 are GRANTED.

23 4. Defendants' motions for summary judgment on I-Enterprise's claims for an
24 accounting, for unjust enrichment, and for punitive damages, are DENIED.

25 This order terminates Docket Nos. 471, 472 and 473.

26 **IT IS SO ORDERED.**

27 Dated: December 30, 2005


MAXINE M. CHESNEY
United States District Judge